Code of Professional Responsibility and Opinions of the D.C. Bar Legal Ethics Committee

1991 Edition

(Through Opinion 215)

District of Columbia Bar 1101 K Street NW, Suite 200
Washington, DC 20005-4210
202-737-4700

Chairpersons, D.C. Bar Committee on Legal Ethics, 1974-91

Monroe H. Freedman
Hofstra University School of Law
1974-76

William H. Allen
Covington & Burling
1976-78

Robert E. Jordan III
Steptoe & Johnson
1978-82

Mark H. Lynch
Covington & Burling
1982-84

Charles E. Buffon
Covington & Burling
1984-86

Warren Anthony Fitch
Swidler & Berlin
1986-87

John J. McAvoy
White & Case
1987-88

James Hamilton
Olwine, Connelly, Chase, O'Donnell & Weyher
1988-89

Linda J. Ravdin
Law Offices of Linda J. Ravdin
1989-91

About the District of Columbia Code of Professional Responsibility and Opinions of the D.C. Bar Legal Ethics Committee

This book contains the Code of Professional Responsibility as in effect in the District of Columbia. Although the majority of the provisions mirror those of the Model Code adopted by the American Bar Association, the District of Columbia Court of Appeals has amended portions of the Model Code. For example, substantial changes were made in Canon 2 and Canon 9. The text of the code incorporates the court's amendments, omitting the inapplicable American Bar Association provisions. For your convenience, each District of Columbia amendment has been footnoted with the text of the American Bar Association provision.* Please note that the American Bar Association provisions are supplied for your information only and are not effective in the District of Columbia.

Following the Code are the District of Columbia Bar, Committee on Legal Ethics opinions interpreting the Code. All opinions, through Opinion No. 116, are included.** It is an unfortunate reality that in this area the book cannot remain current; opinions are issued continually by the Committee. If you want information on or copies of new Ethics Committee opinions, contact the Bar office.

To facilitate your use of the Code, a collection of reference tools precedes the opinions. A topical index to the opinions, as well as opinion abstracts, are included. Citators are provided for references in the District of Columbia opinions to:

- Disciplinary Rules
- Ethical Considerations
- American Bar Association Opinions
- Other District of Columbia Opinions
- Cases
- Statutes

The topical index, abstracts and citators cover Opinion No. 1 through Opinion No. 116 of the District of Columbia Bar, Committee on Legal Ethics.

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* Because of the substantial amendments to Canon 2, the American Bar Association provisions are collected after the Notes that follow the Canon 2 Disciplinary Rules.

**There is no Opinion No. 40, 43 or 61 issued by the Committee because of decisions not to issue opinions for which numbers had been referred. Other opinions have not been included because they rely on provisions of the Code that have been amended or deleted, particularly those in the advertising area of Canon 2. These opinions include Nos. 1, 6, 7, 12, 13, 15, 17, 18, 22, and 46. Copies of those opinions may be obtained from the Bar office.

Preface

On August 14, 1964, at the request of President Lewis F. Powell, Jr., the House of Delegates of the American Bar Association created a Special Committee on Evaluation of Ethical Standards to examine the then current Canons of Professional Ethics and to make recommendations for changes. That committee produced the Code of Professional Responsibility which was adopted in 1969 and became effective January 1, 1970. The new Model Code revised the previous Canons in four principal particulars: (1) there were important areas involving the conduct of lawyers that were either only partially covered in or totally omitted from the Canons; (2) many Canons that were sound in substance were in need of editorial revision; (3) most of the Canons did not lend themselves to practical sanctions for violations; and (4) changed and changing conditions in our legal system and urbanized society required new statements of professional principles.

The original 32 Canons of Professional Ethics were adopted by the American Bar Association in 1908. They were based principally on the Code of Ethics adopted by the Alabama State Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 under the title of *Professional Ethics*. Since then a limited number of amendments have been adopted on a piecemeal basis.

As far back as 1934 Mr. Justice (later Chief Justice) Harlan Fiske Stone, in his memorable address entitled *The Public Influence of the Bar*, made this observation:

> "Before the Bar can function at all as a guardian of the public interests committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationship of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era."

Largely in that spirit, the committee appointed by President Powell in 1964 reached unanimous conclusion that further piecemeal amendment of the original Canons would not suffice. It proceeded to compose the Model Code of Professional Responsibility in response to the perceived need for change in the statement of professional principles for lawyers.

While the opinions of the Committee on Professional Ethics of the American Bar Association had been published and given fairly wide distribution with resulting value to the bench and bar, they certainly were not conclusive as to the adequacy of the previous Canons. Because the opinions were necessarily interpretations of the existing Canons, they tended to support the Canons and were critical of them only in the most unusual case. Since a large number of requests for opinions from the Committee on Professional Ethics dealt with the etiquette of law practice, advertising, partnership names, announcements and the like, there had been a tendency for many lawyers to assume that this was the exclusive field of interest of the Committee and that it was not concerned with the more serious questions of professional standards and obligations.

The previous Canons were not an effective teaching instrument and failed to give guidance to young lawyers beyond the language of the Canons themselves. There was no organized interrelationship between the Canons and they often overlapped. They were not cast in language designed for disciplinary enforcement and many abounded with quaint expressions of the past. Those Canons contained, nevertheless, many provisions that were sound in substance, and all of these were retained in the Code adopted in 1969. In the studies and meetings conducted by the committee which developed the present Code, the committee relied heavily upon the monumental *Legal Ethics* (1953) of Henry S. Drinker, who served with great distinction for nine years as Chairman of the Committee on Professional Ethics (known in his day as the Committee on Professional Ethics and Grievances) of the American Bar Association.

The Formal Opinions of the Committee on Ethics and Professional Responsibility were collected and published in a single volume in 1967, and since that time have been published continuously in

loose-leaf form. (The name was changed in 1971 to the Standing Committee on Ethics and Professional Responsibility). The Informal Opinions of the Committee on Ethics and Professional Responsibility were collected and published in a two volume set in 1975, and since that time also have been published continuously in loose-leaf form.

Since the adoption of the Code of Professional Responsibility in 1969 a number of amendments have been required due to decisions of the Supreme Court of the United States and lower courts relating to the provision of group legal services and the provision of additional legal services on a wide scale not only to indigents but also to persons of moderate means. Furthermore, recent decisions of the Supreme Court of the United States on the subject of the constitutionality of restrictive provisions in the Code relating to lawyer advertising have required a substantial revision of Canon 2 and of other portions of the present Model Code. These modifications in the Code are included in the present printing, up to and including the action taken by the House of Delegates in August of 1978. The Committee on Ethics and Professional Responsibility is mandated under the By-Laws of the American Bar Association (Article 30.7) to recommend appropriate amendments to our clarification of the Model Code. Additional changes are under consideration by the Committee with particular cognizance of recent Court decisions.

Lewis H. Van Dusen, Jr.
Chairman
Committee on Ethics and
Professional Responsibility

The Model Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 12, 1969 and was amended by the House of Delegates in February 1970, February 1974, February 1975, August 1976, August 1977, August 1978, February 1979, and February 1980.

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CODE OF PROFESSIONAL RESPONSIBILITY

PREAMBLE AND PRELIMINARY STATEMENT

Preamble[1]

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government.[2] Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system.[3] A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen,[4] but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.[5]

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strengthen, which permit of no compromise.

Preliminary Statement

In furtherance of the principles stated in the Preamble, the American Bar Association has promulgated this Code of Professional Responsibility, consisting of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules.[6] The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis of disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Consideration and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.[7]

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial,[8] the Disciplinary Rules should be uniformly applied to all lawyers,[9] regardless of the nature of their professional activities.[10] The Code makes no attempt to prescribe either discip-

linary procedures or penalities—for violation of a Disciplinary Rule,[12] nor does it undertake the define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances.[13] An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

NOTES

1. The footnotes are intended merely to enable the reader to relate the provisions of this Code to the ABA Canons of Professional Ethics adopted in 1908, as amended, the Opinions of the ABA Committee on Professional Ethics, and a limited number of other sources; they are not intended to be an annotation of the views taken by the ABA Special Committee on Evaluation of Ethical Standards. Footnootes citing ABA Canons refer to the ABA Canons of Professional Ethics, adopted in 1980, as amended.

2. *Cf.* ABA CANONS, Preamble.

3. "[T]he lawyer stkands today in special need of a clear understanding of his obligations and of the vital connection between these obligations and the role his profession plays in society." *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1160 (1958).

4. "No general statement of the responsibilities of the legal profession can encompass all the situations in which the lawyer may be placed. Each position held by him makes its own peculiar demands. These demands the lawyer must clarify for himself in the light of the particular role in which he serves." *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1218 (1958).

5. "The law and its institutions change as social conditions change. They must change if they are to preserve, much lest advance, the political and social values from which they derive their purposes and their life. This is true of the most important of legal institutions, the profession of law. The profession, too, must change when conditions change in order to preserve and advance the social values that are its reasons for being." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar,* 12, U.C.L.A. L. REV. 438, 440, (1965).

6. The Supreme Court of Wisconsin adopted a Code of Judicial Ethics in 1967. "The code is divided into standards and rules, the standards being statements of what the general desirable level of conduct should be, the rules being particular canons, the violation of which shall subject an individual judge to sanctions." In re Promulgation of a Code of Judicial Ethics, 36 Wis. 2d 252, 255, 153 N.W. 2d 873, 874 (1967).

The portion of the Wisconsin Code of Judicial Ethics entitled "Standards" states that "[t]he following standards set forth the significant qualities of the ideal judge. . . ." *Id.,* 36 Wis.2d at 256, 153 N.W. 2d at 875. The portion entitled "Rules" states that "[t]he court promulgates the following rules because the requirements of judicial conduct embodied therein are of sufficient gravity to warrant sanctions if they are not obeyed. . . ." *Id.,* 36 Wis.2d at 259, 153 N.W. 2d at 876.

7. "under the conditions of modern practice it is peculiarly necesssary that the lawyer should understand, not merely the established standards of professional conduct, but the reasons underlying these standards. Today the lawyer plays a changing and increasingly varied role. In many developing fields the precise contribution of the legal profession is as yet undefined." *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159 (1958).

"A true sense of professional responsibility must derive from an understanding of the reasons that lie back of specific restraints, such as those emboided in the Canons. The grounds for the lawyer's peculiar obligations are to be found in the nature of his calling. The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective." Id.

8. "Disbarment, designed to protect the public, is a punishment or penality imposed on the lawyer. . . . He is accordingly entitled to procedural due process, which includes fair notice of the charge." In re Ruffalo, 390 U.S. 544, 550, 20 L. Ed. 2d 117, 122 88 S. Ct. 1222, 1226 (1968), *rehearing denied,* 391 U.S. 961, 20 L. Ed. 2d 874, 88 St. Ct. 1833 (1968).

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process of Equal Protection Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification. . . but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." Schware v. Bd. of Bar Examiners, 353 U.S. 232, 239, 1 L. Ed. 2d 796, 801-02, 77 S. Ct. 752, 756 (1957).

"[A]n accused lawyer may expect that he will not be condemned out of a capricious self-righteousness or denied the essentials of a fair hearing." Kingsland v. Dorsey, 338 U.S. 318, 320, 94 L. Ed. 123, 126, 70 S. Ct. 123, 124-25 (1949).

"The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, for moral or professional delinquency." Ex parte Garland, 71 U.S. (4 Wall.) 333, 378-79, 18 L. Ed. 366, 370 (1866).

See generally Comment, *Procedural Due Process and Character Hearings for Bar Applicants,* 15 STAN. L. REV. 500 (1963).

9. "The canons of professional ethics must be enforced by the Courts and must be respected by members of the Bar if we are to maintain public confidence in the integrity and impartiality of the administration of justice." In re Meeker, 76 N. M. 354, 357, 414 P.2d 862, 864 (1966), *appeal dismissed,* 385 U.S. 449 (1967).

10. *See* ABA CANON 45.

"The Canons of this Association govern all its members, irrespective of the nature of their practice, and the application of the Canons is not affected by statutes or regulations governing certain activities of lawyers which may prescribe less stringent standards." ABA COMM. ON PROFESSIONAL ETHICS, *OPINIONS,* No. 203 (1940) [hereinafter each Opinion is cited as *"ABA Opinion"*].

CF. ABA Opinion 152 (1936).

11. "There is generally no prescribed discipline for any particular type of improper conduct. The disciplinary measures taken are discretionary with the courts, which may disbar, suspend, or merely censure the attorney as the nature of the offense and past indicia of character may warrant." Note, 43 CORNELL L.Q. 489, 495 (1958).

12. The Code seeks only to specify conduct for which a lawyer should be disciplined. Recommendations as to the procedures to be used in disciplinary actions and the gravity of disciplinary measures appropriate for violations of the Code are within the jurisdiction of the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement.

13. "The severity of the judgment of this court should be in proportion to the gravity of the offenses, the moral turpitude involved, and the extent that the defendant's acts and conduct affect his professional qualifications to practice law." Louisiana State Bar Ass'n v. Steiner, 204 La. 1073, 1092-93, 16 So. 2d 843, 850 (1944) (Higgins, J., concurring in decree).

"Certainly an erring lawyer who has been disciplined and who having paid the penalty has given satisfactory evidence of repentance and has been rehabilitated and restored to his place at the bar by the court which knows him best ought not to have what amounts to an order of permanent disbarment entered against him by a federal court solely on the basis of an earlier criminal record and without regard to his subsequent rehabilitation and present good character. . . . We think, therefore, that the district court should reconsider the appellant's application for admission and grant it unless the court finds it to be a fact that the appellant is not presently of good moral or professional character." In re Drier, 258 F.2d 68, 69-70 (3d Cir. 1958).

CANON 1
A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

ETHICAL CONSIDERATIONS

EC 1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC 1-2 The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education[1] or moral standards[2] or of other relevant factors[3] but who nevertheless seek to practice law. To assure the maintenance of high moral and educational standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar.[4] In like manner, the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education.

EC 1-3 Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character. Although a lawyer should not become a self-appointed investigator or judge of applicants for admission, he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant.[5]

EC 1-4 The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules.[6] A lawyer should, upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.[7]

EC 1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct.[8] Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC 1-6 An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice.[9] In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

DISCIPLINARY RULES

DR 1-101 Maintaining Integrity and Competence of the Legal Profession.

(A) A lawyer subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.[10]

(B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.[11]

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.[12]

(3) Engage in illegal conduct involving moral turpitude that adversely reflects on his fitness to practice law.[13]*

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.**

DR 1-103 Disclosure of Information to Authorities.

(A) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal such knowledge or evidence

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*** The provision is as amended by the District of Columbia Court of Appeals, April 1, 1972. As adopted by the American Bar Association, DR 1-102(A)(3) states: Engage in illegal conduct involving moral turpitude.**

**** Subsection (6) of DR 1-102 was deleted by the District of Columbia Court of Appeals, April 1, 1972. The deleted American Bar Association provision reads: "Engage in any other conduct that adversely reflects on his fitness to practice law."**

upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.'****
(B) [Omitted]****

*****The provision is as amended by the District of Columbia Court of Appeals, April 1, 1972. As adopted by the American Bar Association, DR 1-103(A) states:**

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such evaluation.

******The American Bar Association rule DR 1-103(B) is identical to rule DR 1-103(A) as amended by the District of Columbia Court of Appeals.**

NOTES

1. "[W]e cannot conclude that all educational restrictions [on bar admission] are unlawful. We assume that few would deny that a grammar school education requirement, before taking the bar examination, was reasonable. Or that an applicant had to be able to read or write. Once we conclude that *some* restriction is proper, then it becomes a matter of degree —the probelm of drawing the line.

. . . .

"We conclude the fundamental question here is whether Rule IV, Section 6 of the Rules Pertaining to Admission of Applicants to the State Bar of Arizona is 'arbitrary, capricious and unreasonable.' We conclude an educational requirement of graduation from an accredited law school is not." Hackin v. Lockwood, 361 F.2d 499, 503-4 (9th Cir. 1966), *cert. denied,* 385 U.S. 960, 17 L. Ed.2d 305, 87 S. Ct. 396 (1966).

2. "Every state in the United States, as a prerequisite for admission to the practice of law, requires that applicants possess 'good moral character.' Although the requirement is of judicial origin, it is now embodied in legislation in most states." Comment, *Procedural Due Process and Character Hearings for Bar Applicants,* 15 Stan. L. Rev. 500 (1963).

"Good character in the members of the bar is essential to the preservation of the integrity of the courts. The duty and power of the court to guard its portals against intrusion by men and women who are mentally and morally dishonest, unfit because of bad character, evidenced by their course of conduct, to participate in the administrative law, would seem to be unquestioned in the matter of preservation of judicial dignity and integrity." In re Monaghan, 126 Vt. 53, 222 A.2d 665, 670 (1966).

"Fundamentally, the question involved in both situations [*i.e.* admission and disciplinary proceedings] is the same—is the applicant for admission or the attorney sought to be disciplined a fit and proper person to be permitted to practice law, and that usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude. At the time of oral argument the attorney for respondent frankly conceded that the test for admission and for discipline is and should be the same. We agree with this concession." Hallinan v. Comm. of Bar Examiners, 65 Cal.2d 447, 453, 421 P.2d 76, 81, 55 Cal.Rptr. 228, 233 (1966).

3. "Proceedings to gain admission to the bar are for the purpose of protecting the public and the courts from the ministrations of persons unfit to practice the profession. Attorneys are officers of the court appointed to assist the court in the administration of justice. Into their hands are committed the property, the liberty and sometimes the lives of their clients. This commitment demands a high degree of intelligence, knowledge of the law, respect for its function in society, sound and faithful judgment and, above all else, integrity of character in private and professional conduct." In re Monaghan, 126 Vt. 53, 222 A.2d 665, 676 (1966) (Holden, C.J., dissenting).

4. "A bar composed of lawyers of good moral character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar." Konigsberg v. State Bar, 353 U.S. 252, 273, 1 L. Ed. 2d 810, 825, 77 S. Ct. 722, 733 (1957).

5. *See* ABA Canon 29.

6. ABA Canon 28 designates certain conduct as unprofessional and then states that: "A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred." ABA Canon 29 states a broader admonition: "Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession."

7. "It is the obligation of the organized Bar and the individual lawyer to give unstinted cooperation and assistance to the highest court of the state in discharging its function and duty with respect to discipline and in purging the profession of the unworthy." *Report of the Special Committee on Disciplinary Procedures,* 80 A.B.A. Rep. 463, 470 (1955).

8. *Cf.* ABA Canon 32.

9. "We decline, on the present record, to disbar Mr. Sherman or to reprimand him—not because we condone his actions, but because, as heretofore indicated, we are concerned with whether he is mentally responsible for what he has done.

"The logic of the situation would seem to dictate the conclusion that, if he was mentally responsible for the conduct we have outlined, he should be disbarred; and, if he was not mentally responsible, he should not be permitted to practice law.

"However, the flaw in the logic is that he may have been mentally irresponsible [at the time of his offensive conduct]. . . , and, yet, have sufficiently improved in the almost two and one-half years intervening to be able to capably and competently represent his clients. . . .

. . . .

"We would make clear that we are satisfied that a case has been made against Mr. Sherman, warranting a refusal to permit him to further practice law in this state unless he can establish his mental irresponsibility at the time of the offenses charged. The burden of proof is upon him.

"If he establishes such mental irresponsibility, the burden is then upon him to establish his present capability to practice law." In re Sherman, 58 Wash. 2d 1, 6-7, 354 P.2d 888, 890 (1960), *cert. denied,* 371 U.S. 951, 9 L. Ed. 2d 499, 83 S. Ct. 506 (1963).

10. "This Court has the inherent power to revoke a license to practice law in this State, where such license was issued by this Court, and its issuance was procured by the fraudulent concealment, or by the false and fraudulent representation by the applicant of a fact which was manifestly material to the issuance of the license." North Carolina ex rel. Attorney General v. Gorson, 209 N.C. 320, 326, 183 S.E. 392, 395 (1936), *cert. denied,* 298 U.S. 662, 80 L. Ed. 1387, 56 S. Ct. 752 (1936).

See also Application of Patterson, 318 P.2d 907, 913 (Or. 1957), *cert. denied,* 356 U.S. 947, 2 L. Ed. 2d 822, 78 S. Ct. 795 (1958).

11. *See* ABA Canon 29.

12. In *ABA Opinion* 95 (1933), which held that a municipal attorney could not permit police officers to interview persons with claims against the municipality when the attorney knew the claimants to be represented by counsel, the Committee on Professional Ethics said:

"The law officer is, of course, responsible for the acts of those in his department who are under his supervision and control. *Opinion 85. In re Robinson,* 136 N.Y.S. 548 (affirmed 209 N.Y. 354-1912) held that it was a matter of disbarment for an attorney to adopt a general course of approving the unethical conduct of employees of his client, even though he did not actively participate therein.

"'. . . The attorney should not advise or sanction acts by his client which he himself should not do.' *Opinion 75.*"

13. "The most obvious non-professional ground for disbarment is conviction for a felony. Most states make conviction for a felony grounds for automatic disbarment. Some of these states, including New York, make disbarment mandatory upon conviction for *any* felony, while others require disbarment only for those felonies which involve moral turpitude. There are strong arguments that some felonies, such as involuntary manslaughter, reflect neither on an attorney's fitness, trustworthiness, nor competence and, therefore, should not be grounds for disbarment, but most states tend to disregard these arguments and, following the common law rule, make disbarment mandatory on conviction for any felony." Note, 43 Cornell L.Q. 489, 490 (1958).

"Some states treat conviction for misdemeanors as grounds for automatic disbarment. . . . However, the vast majority, accepting the common law rule, require that the misdemeanor involve moral turpitude.

While the definition of moral turpitude may prove difficult, it seems only proper that those minor offenses which do not affect the attorney's fitness to continue in the profession should not be grounds for disbarment. A good example is an assault and battery conviction which would not involve moral turpitude unless done with malice and deliberation." *Id.* at 491.

"The term 'moral turpitude' has been used in the law for centuries. It has been the subject of many decisions by the courts but has never been clearly defined because of the nature of the term. Perhaps the best general definition of the term 'moral turpitude' is that it imparts an act of baseness, vileness or depravity in the duties which one person owes to another or to society in general, which is contrary to the usual, accepted and customary rule of right and duty which a person should follow. 58 C.J.S. at page 1201. Although offenses against revenue laws have been held to be crimes of moral turpitude, it has also been held that the attempt to evade the payment of taxes due to the government or any subdivision thereof, while wrong and unlawful, does not involve moral turpitude. 58 C.J.S. at page 1205." Comm. on Legal Ethics v. Scheer, 149 W. Va. 721, 726-27, 143 S.E.2d 141, 145 (1965).

"The right and power to discipline an attorney, as one of its officers, is inherent in the court.... This power is not limited to those instances of misconduct wherein he has been employed, or has acted, in a professional capacity; but, on the contrary, this power may be exercised where his misconduct outside the scope of his professional relations shows him to be an unfit person to practice law." In re Wilson, 391 S.W.2d 914, 917-18 (Mo. 1965).

Footnote 14 is deleted because of amendments to Canon 1.

Footnote 15 is deleted because of amendments to Canon 1.

16. *Cf.* ABA Canons 28 and 29.

*CANON 2**
A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

ETHICAL CONSIDERATIONS

EC 2-1 The need of members of the public for legal services[1] is met only if they recognize their legal problems, appreciate the importance of seeking assistance,[2] and are able to obtain the services of acceptable legal counsel.[3] Hence, important functions of the legal profession are to educate laypersons to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.[4]

Recognition of Legal Problems

EC 2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, laywers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications[5] and participation in seminars, lectures, and civic programs should be motivated by a desire to benefit the public in its awareness of legal needs and selection of the most appropriate counsel rather than to obtain publicity for particular lawyers.

EC 2-3 Whether a lawyer acts properly in volunteering advice to a layperson to seek legal services depends upon the circumstances.[6] The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems.[7] The advice is proper whenever it is motivated by a desire to protect one who does not recognize that he or she may have legal problems or who is ignorant of his or her legal rights or obligations. It is improper if motivated by a desire to cause legal action to be taken merely to harass or injure another.

EC 2-4 [Omitted]

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems and informing them of his or her services should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems,[10] since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.[11]

Selection of a Lawyer

EC 2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he or she had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices.[12] The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.[13] Lack of information about the availability of lawyers, the specialized competence of particular lawyers, and the expense of initial consultation has been said to lead laypersons to avoid seeking legal advice.

EC 2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and restrained publicity may be helpful. A lawyer should not seek to influence another to recommend his or her employment. A lawyer should not compensate another person for recommending him or her, for influencing a prospective client to employ him or her, or to encourage future recommendations.[14] Advertisements and public communications, whether in law lists, announcement cards, newspapers, or on radio or television, should be formulated to convey only information that is necessary to make an appropriate selection. Self-laudation should be avoided. Information that may be helpful in some situations would include: (1) office information, such as name, including name of law firm and names of professional associates, addresses, telephone numbers, credit card acceptability, languages spoken and written, and office

***Canon 2 was amended by the District of Columbia Court of Appeals on July 12, 1978. Ethical Consideration 2-1 through 2-15 and Disciplinary Rules 2-101 through 2-105 were deleted and new provisions were substituted by the court. The text of the American Bar Association provisions follows the Notes.**

hours; (2) biographical information; (3) description of the practice, including a statement that practice is limited to one or more fields of law; and (4) permitted fee information.

EC 2-8A The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide that public benefit. For example, prominence should not be given to a prior governmental position outside the context of biographical information. Similarly, the use of media whose scope or nature clearly suggests that the use is intended for self-laudation of the lawyer without concomitant benefit to the public such as the use of billboards, electrical signs, or soundtrucks, distorts the legitimate purpose of informing the public and is clearly improper. Indeed, this and other improper advertising may hinder informed selection of competent, independent counsel, and advertising that involves excessive cost may unnecessarily increase fees for legal services.

EC 2-8B Advertisements and other communications should make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually. Because fee information frequently may be incomplete and misleading to a layperson, a lawyer should exercise great care to assure that fee information is complete and accurate. Because of the individuality of each legal problem, public statements regarding average, minimum or estimated fees may be deceiving as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. It would be misleading to advertise a set fee for a specific type of case without adhering to the stated fee in charging clients. Advertisements or public claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly improper. Statistical data or other information based on past performance or prediction of future success is deceptive because it ignores important variables. Only factual assertions, and not opinions, should be made in public communications. It is improper to claim or imply an ability to influence a court, tribunal, or other public body or official except by competent advocacy. Commercial publicity and public communications addressed to undertaking any legal action should always indicate the provisions of such undertaking and should disclose the impossibility of assuring any particular result. Not only must commercial publicity be truthful but its accurate meaning must be apparent to the layperson with no legal background. Any commercial publicity or advertising for which payment is made should so indicate unless it is apparent from the context that it is paid publicity or an advertisement.

EC 2-9 The traditional regulation of advertising by lawyers is rooted in the public interest. Competitive advertising through which a lawyer seeks business by use of extravagant, artful, self-laudatory or brash statements or appeals to fears and emotions could mislead and harm the layperson. Furthermore, public communications that would produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers would be harmful to society. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship, being personal and unique, should not be established as the result of pressures or deceptions. However, the desirability of affording the public access to information relevant to legal rights has resulted in some relaxation of the former restrictions against advertising by lawyers. Those retrictions have long been relaxed in regard to law lists, announcement cards and institutional advertising. Historically, those restrictions were imposed to prevent deceptive publicity that would mislead laypersons, cause distrust of the law and lawyers, and undermine public confidence in the legal system, and all lawyers should remain vigilant to prevent such results. Only unambiguous information relevant to a layperson's decision regarding his or her legal rights or selection of counsel, provided in ways that comport with the dignity of the profession and do not demean the administration of justice, is appropriate in public communications.

EC 2-10 The Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding falsity, deception, and misrepresentation. All publicity should be evaluated with regard to its effect on the layperson with no legal experience. The non-lawyer is best served if advertisements contain no misleading information or emotional appeals, and emphasize the necessity of an individualized evaluation of the situation before conclusions as to legal needs and probable expenses can be made. The attorney-client relationship should result from a free and informed choice by the layperson. Unwarranted promises of benefits, overpersuasion, or vexatious or harassing conduct are improper.

EC 2-11 The name under which a lawyer conducts his or her practice may be a factor in the selection process.[15] The use of a name which could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder is not proper.[16] For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby.[17] However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his or her name to remain in the name of the firm if he or she actively continues to practice law as a member thereof. Otherwise, his or her name should be removed from the firm name,[18] and he or she should not be identified as a past or present member of the firm; and he or she should not hold oneself out as being a practicing lawyer.

EC 2-13 In order to avoid the possibility of misleading persons with whom he or she deals, a lawyer should be scrupulous in the representation of his or her professional status.[19] One should not hold oneself out as being a partner or associate of a law firm if he or she is not one in fact,[20] and thus should not hold oneself out as a partner or associate if he or she only shares offices with another lawyer.[21]

EC 2-14 In some instances a lawyer confines his or her practice to a particular field of law.[22] In the absence of local controls to insure the existence of special competence, a lawyer should not be permitted to hold himself or herself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate if it is factual, a limitation of his or her practice or that the lawyer practices in one or more particular areas or fields of law in public announcements which will assist laypersons in selecting counsel and accurately describe the limited area in which the lawyer practices.

EC 2-15 The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layperson to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

Financial Ability to Employ Counsel: Generally

EC 2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees[23] should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services,[24] and lawyers should support and participate in ethical activities designed to achieve that objective.[25]

Financial Ability to Employ Counsel: Persons Able to Pay Reasonable Fees

EC 2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer.[26] A lawyer should not charge more than a reasonable fee,[27] for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.[28]

EC 2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances,[29] including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

EC 2-19 As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC 2-20 Contingent fee arrangements[30] in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid.[31] Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same consideration as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee.

EC 2-21 A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure.[32]

EC 2-22 Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly by divided between lawyers[33] properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer[34] and if the total fee is reasonable.

EC 2-23 A lawyer should be zealous in his efforts to avoid controversies over fees with clients[35] and should attempt to resolve amicably any differences on the subject.[36] He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.[37]

Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees

EC 2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.[38]

EC 2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need.[39] Thus it has been necessary for the profession to institute additional programs to provide legal services.[40] Accordingly, legal aid offices,[41] lawyer referral services, and other related programs have been developed, and others will be developed, by the profession.[42] Every lawyer should support all proper efforts to meet this need for legal services.[43]

Acceptance and Retention of Employment

EC 2-26 A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.[44]

EC 2-27 History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.[45]

EC 2-28 The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers,[46] public officials, or influential members of the community does not justify his rejection of tendered employment.

EC 2-29 When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons.[47] Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity[48] or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty,[49] or the belief of the lawyer regarding the merits of the civil case.[50]

EC 2-30 Employment should not be accepted by a lawyer when he is unable to render competent service[51] or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another.[52] Likewise, a lawyer should decline

employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves[53] or withdraws, or the client terminates the prior employment.[54]

EC 2-31 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

EC 2-32 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances,[55] and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client[56] as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal,[57] suggesting employment of other counsel, delivering to the client all papers and properties to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.[58]

EC 2-33 As a part of the legal profession's commitment to the principle that high quality legal services should be available to all, attorneys are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients. An attorney so participating should make certain that his relationship with a qualified legal assistance organization in no way interferes with his independent, professional representation of the interests of the individual client. An attorney should avoid situations in which officials of the organization who are not lawyers attempt to direct attorneys concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the attorneys employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

DISCIPLINARY RULES

DR 2-101 Publicity and Advertising.

(A) A lawyer shall not knowingly make any representation about his or her ability, background, or experience or that of the lawyer's partner or associate, or about the fee or any other aspect of a proposed professional engagement, that is false, fraudulent, misleading, or deceptive, and that might reasonably be expected to induce reliance by a member of the public.

(B) Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:

(1) Contains a material misrepresentation of fact;

(2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;

(3) Is intended or is likely to create an unjustified expectation;

(4) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;

(5) Relates to legal fees other than:

(a) A statement of the fee for an initial consultation;

(b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(c) A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter;

(e) The availability of credit arrangements; and

(f) A statement of the fees charged by a qualified legal assistance organization in which he or she participates for specific legal services the description of which would not be misunderstood or be deceptive; or

(6) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

(C) A lawyer shall not, on his or her own behalf, or on behalf of a partner or associate, or any other lawyer affiliated with the firm, use or participate in the use of any form of public communication which:

(1) Contains statistical data or other information based on past performance or prediction of future success;

(2) Contains a testimonial about or endorsement of a lawyer;

(3) Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public;

(4) Is intended or is likely to attract clients by use of showmanship or self-laudation.

(D) A lawyer shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item. A paid advertisement must be identified as such unless it is apparent from the context that it is a paid advertisement. If the paid advertisement is communicated to the public by use of radio or television, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer.

DR 2-102 Professional Notices, Letterheads, Offices and Law Lists.

(A) A lawyer or law firm shall not use or participate in the use of a professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing, or a similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C).

(B) A lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B), or is contrary to law. However, the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his or her name to remain in the name of a law firm or to be used in professional notices of or public communications by the firm during any significant period in which he or she is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his or her name in the firm name or in professional notices of or public communications by the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers or professional corporations unless they are in fact partners.*

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his or her name, an earned degree or title derived therefrom indicating his or her training in the law.

DR 2-103 Solicitation of Professional Employment.**

(A) A lawyer shall not seek by in-person contact, or through an intermediary, his or her employment (or employment of a partner or associate) by a non-lawyer who has not sought his or her advice regarding employment of a lawyer, if:

(1) The solicitation involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B); or

(2) The solicitation involves the use of undue influence; or

(3) The potential client is apparently in a physical or mental condition which would make it unlikely that he or she could exercise reasonable, considered judgment as to the selection of a lawyer.

(B) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of his or her services or those of his or her partner, or associate, or any other lawyer affiliated with him or her or his or her firm, as a private practitioner, if:

(1) The promotional activity involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101 (C); or

(2) The promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.

(C) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his or her employment by a client, or as a reward for having made a recommendation resulting in his or her employment by a client, except that he or she may pay for public communications permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service.**

(D) A lawyer shall not accept employment when he or she knows or it is obvious that the person who seeks his or her services does so as a result of conduct prohibited under this Disciplinary Rule.

(E) No lawyer or any person acting on behalf of a lawyer shall solicit or invite or seek to solicit any person for purposes of representing him or her in any present or future Superior Court case in the District of Columbia Courthouse, on the sidewalks on the North, South, and West sides of the courthouse, or within 50 feet of the building on the East side.***

DR 2-104 Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layperson that he or she should obtain counsel or take legal action shall not accept employment resulting from that advice if:

(1) The advice embodies or implies a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C); or

(2) The advice involves the use by the lawyer of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overreaching, or vexatious or harassing conduct.

DR 2-105 Limitation of Practice.

(A) A lawyer shall not hold himself or herself out publicly as, or imply that he or she is, a recognized or certified specialist, except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his or her letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms, on his or her letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his or her letterhead and office sign.

(B) A statement, announcement, or holding out as limiting practice to a particular area or field of law does not constitute a violation of DR 2-105(A) if the statement, announcement, or holding out does not include a statement or claim that is false, fraudulent, misleading or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C).

DR 2-106 Fees for Legal Services.[87]

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.[88]

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.[88]

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.[89]

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.[90]

DR 2-107 Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer

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* Rule DR 2-102(C) was revised by the American Bar Association in February 1979. Pursuant to the District of Columbia Court of Appeals Rule X, the amendment is incorporated in the standards governing the practice of law in the District of Columbia.

** These provisions are as amended by the District of Columbia Court of Appeals, October 2, 1981. As adopted by the American Bar Association, DR 2-103 (A) and (C) state:

(A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner," except as authorized in DR 2-101, and except that

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.[76]

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

***By order of June 11, 1981, the District of Columbia Court of Appeals added subsection (E).

who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.[91]

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.[92]

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

DR 2-108 Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.[93]

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

DR 2-109 Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.[94]

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR 2-110 Withdrawal from Employment.[95]

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injurying any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.[96]

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.[97]

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.[98]

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

NOTES

1. "Men have need for more than a system of law; they have need for a system of law which functions, and that means they have need for lawyers." Cheatham, *The Lawyer's Role and Surroundings*, 25 Rocky Mt. L. Rev. 405 (1953).

2. "Law is not self-applying; men must apply and utilize it in concrete cases. But the ordinary man is incapable. He cannot know the principles of law or the rules guiding the machinery of law administration; he does not know how to formulate his desires with precision and to put them into writing; he is ineffective in the presentation of his claims." *Id.*

3. "This need [to provide legal services] was recognized by...Mr. [Lewis F.] Powell [Jr., President, American Bar Association, 1963-64], who said: 'Looking at contemporary America realistically, we must admit that despite all our efforts to date (and these have not been insignificant), far too many persons are not able to obtain equal justice under law. This usually results because their poverty or their ignorance has prevented them from obtaining legal counsel.'" Address by E. Clinton Bamberger, Association of American Law Schools 1965 Annual Meeting, Dec. 28, 1965, in Proceedings, Part II, 1965, 61, 63-64 (1965).

"A wide gap separates the need for legal services and its satisfaction, as numerous studies reveal. Looked at from the side of the layman, one reason for the gap is poverty and the consequent inability to pay legal fees. Another set of reasons is ignorance of the need for and the value of legal services, and ignorance of where to find a dependable lawyer. There is fear of the mysterious processes and delays of the law, and there is fear of overreaching and overcharging by lawyers, a fear stimulated by the occasional exposure of shysters." Cheatham, *Availability of Legal Services; The Responsibilty of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. Rev. 438 (1965).

4. "It is not only the right but the duty of the profession as a whole to utilize such methods as may be developed to bring the services of its members to those who need them, so long as this can be done ethically and with dignity." *ABA Opinion* 320 (1968).

"[T]here is a responsibility on the bar to make legal services available to those who need them. The maxim, 'privilege brings responsibilities,' can be expanded to read, exclusive privilege to render public service brings responsibility to assure that the service is available to those in need of it." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. Rev. 438, 443 (1965).

"The obligation to provide legal services for those actually caught up in litigation carries with it the obligation to make preventive legal advice accessible to all. It is among those unaccustomed to business affairs and fearful of the ways of the law that such advice is often most needed. If it is not received in time, the most valiant and skillful representation in court may come too late." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216 (1958).

5. "A lawyer may with propriety write articles for publications in which he gives information upon the law...." ABA Canon 40.

6. *See* ABA Canon 28.

7. This question can assume constitutional dimensions: "We meet at the outset the contention that 'solicitation' is wholly outside the area of freedoms protected by the First Amendment. To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful

ends, against governmental intrusion....

....

"However valid may be Virginia's interest in regulating the traditionally illegal practice of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against governments in other countries, the exercise in our own, as in this case of First Amendment rights to enforce Constitutional rights through litigation, as a matter of law, cannot be deemed malicious." NAACP v. Button, 371 U.S. 415, 429, 439-40, 9 L. Ed. 2d 405, 415-16, 422, 83 S. Ct. 328, 336, 341 (1963).

Footnotes 8-9 deleted because of amendments to Canon 2.

10. "*Rule 18*... A member of the State Bar shall not advise inquirers or render opinions to them through or in connection with a newspaper, radio or other publicity medium of any kind in respect to their specific legal problems, whether or not such attorney shall be compensated for his services." Cal. Business and Professions Code § 6076 (West 1962).

11. "In any case where a member might well apply the advice given in the opinion to his individual affairs, the lawyer rendering the opinion [concerning problems common to members of an association and distributed to the members through a periodic bulletin] should specifically state that this opinion should not be relied on by any member as a basis for handling his individual affairs, but that in every case he should consult his counsel. In the publication of the opinion the association should make a similar statement." *ABA Opinion* 273 (1946).

12. "A group of recent interrelated changes bears directly on the availbility of legal services.... [One] change is the constantly accelerating urbanization of the country and the decline of personal and neighborhood knowledge of whom to retain as a professional man." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar,* 12 U.C.L.A. L. Rev. 438, 440 (1965).

13. *Cf.* Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes,* 63 Colum. L. Rev. 973, 974 (1963).

14. *See* ABA Canon 28.

15. *Cf. ABA Opinion* 303 (1961).

16. *See* ABA Canon 33.

17. *Id.*

"The continued use of a firm name by one or more surviving partners after the death of a member of the firm whose name is in the firm title is expressly permitted by the Canons of Ethics. The reason for this is that all of the partners have by their joint and several efforts over a period of years contributed to the good will attached to the firm name. In the case of a firm having widespread connections, this good will is disturbed by a change in firm name every time a name partner dies, and that reflects a loss in some degree of the good will to the building up of which the surviving partners have contributed their time, skill and labor through a period of years. To avoid this loss the firm name is continued, and to meet the requirements of the Canon the individuals constituting the firm from time to time are listed." *ABA Opinion* 267 (1945).

"Accepted local custom in New York recognizes that the name of a law firm does not necessarily identify the individual members of the firm, and hence the continued use of a firm name after the death of one or more partners is not a deception and is permissible....The continued use of a deceased partner's name in the firm title is not affected by the fact that another partner withdraws from the firm and his name is dropped, or the name of the new partner is added to the firm name." *Opinion* No. 45, Committee on Professional Ethics, New York State Bar Ass'n, 39 N.Y. St. B.J. 455 (1967).

Cf. ABA Opinion 258 (1943).

18. *Cf.* ABA Canon 33 and *ABA Opinion* 315 (1965).

19. *Cf. ABA Opinions* 283 (1950) and 81 (1932).

20. *See ABA Opinion* 316 (1967).

21. "The word 'associates' has a variety of meanings. Principally through custom the word when used on the letterheads of law firms has come to be regarded as describing those who are employees of the firm. Because the word has acquired this special significance in connection with the practice of the law the use of the word to describe lawyer relationships other than employer-employee is likely to be misleading." In re Sussman and Tanner, 241 Ore. 246, 248, 405 P.2d 355, 356 (1965).

According to *ABA Opinion* 310 (1963), use of the term "associates" would be misleading in two situations: (1) where two lawyers are partners and they share both responsibility and liability for the partnership; and (2) where two lawyers practice separately, sharing no responsibility or liability, and only share a suite of offices and some costs.

22. "For a long time, many lawyers have, of necessity, limited their practice to certain branches of law. The increasing complexity of the law and the demand of the public for more expertness on the part of the lawyer has, in the past few years—particularly in the last ten years—brought about specialization on an increasing scale." *Report of the Special Committee on Specialization and Specialized Legal Services,* 79 A.B.A. Rep. 582, 584 (1954).

23. *See* ABA Canon 12.

24. *Cf.* ABA Canon 12.

25. "If there is any fundamental proposition of government on which all would agree, it is that one of the highest goals of society must be to achieve and maintain equality before the law. Yet this ideal remains an empty form of words unless the legal profession is ready to provide adequate representation for those unable to pay the usual fees." *Professional Representation: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1216 (1958).

26. *See* ABA Canon 12.

27. *Cf.* ABA Canon 12.

28. "When members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the service rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient." *ABA Opinion* 302 (1961).

Cf. ABA Opinion 307 (1962).

29. *See* ABA Canon 12.

30. *See* ABA Canon 13; *see also* Mackinnon, Contingent Fees for Legal Services (1964) (A report of the American Bar Foundation).

"A contract for a reasonable contingent fee where sanctioned by law is permitted by *Canon 13,* but the client must remain responsible to the lawyer for expenses advanced by the latter. 'There is to be no barter of the privilege of prosecuting a cause for gain in exchange for the promise of the attorney to prosecute at his own expense.' (Cardozo, C.J. in Matter of Gilman, 251 N.Y. 265, 270-271.)" *ABA Opinion* 246 (1942).

31. *See* Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution,* 26 U. Pitt. L. Rev. 811 829 (1965).

32. *See* ABA Canon 38.

"Of course, as...[Informal Opinion 679] points out, there must be full disclosure of the arrangement [that an entity other than the client pays the attorney's fee] by the attorney to the client...." *ABA Opinion* 320 (1968).

33. "Only lawyers may share in...a division of fees, but...it is not necessary that both lawyers be admitted to practice in the same state, so long as the division was based on the division of services or responsibility." *ABA Opinion* 316 (1967).

34. *See* ABA Canon 34.

"We adhere to our previous rulings that where a lawyer merely brings about the employment of another lawyer *but renders no service and assumes no responsibility in the matter,* a division of the latter's fee is improper. (*Opinions 18 and 153).*

"It is assumed that the bar, generally, understands what acts or conduct of a lawyer may constitute 'services' to a client within the intendment of *Canon 12.* Such acts or conduct invariably, if not always, involve 'responsibility' on the part of the lawyer, whether the word 'responsibility' be construed to denote the possible resultant legal or moral liability on the part of the lawyer to the client or to others, or the onus of deciding what should or should not be done in behalf of the client. The word 'services' in *Canon 12* must be construed in this broad sense and may apply to the selection and retainer of associate counsel as well as to other acts or conduct in the client's behalf." *ABA Opinion* 204 (1940).

35. *See* ABA Canon 14.

36. *Cf. ABA Opinion* 320 (1968).

37. *See* ABA Canon 14.

"Ours is a learned profession, not a mere money-getting trade.... Suits to collect fees should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment. And where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights." *ABA Opinion* 250 (1943).

But cf. ABA Opinion 320 (1968).

38. "As a society increases in size, sophistication and technology, the body of laws which is required to control that society also increases in size, scope and complexity. With this growth, the law directly affects more and more facets of individual behavior, creating an expanding need for legal services on the part of the individual members of the society.... As legal guidance in social and commercial behavior increasingly becomes necessary, there will come a concurrent demand from the layman that such guidance be made available to him. This demand will not come from those who are able to employ the best legal talent, nor from those who can obtain legal assistance at little or no cost. It will come from the large 'forgotten middle income class,' who can neither afford to pay proportionately large fees nor qualify for ultra-low-cost services. The legal profession must

recognize this inevitable demand and consider methods whereby it can be satisfied. If the profession fails to provide such methods, the laity will." Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution,* 26 U. Pitt. L. Rev. 811, 811-12 (1965).

"The issue is not whether we do something or do nothing. The demand for ordinary everyday legal justice is so great and the moral nature of the demand is so strong that the issue has become whether we devise, maintain, and support suitable agencies able to satisfy the demand or, by our own default, force the government to take over the job, supplant us, and ultimately dominate us." Smith, *Legal Service Offices for Persons of Moderate Means,* 1949 Wis. L. Rev. 416, 418 (1949).

39. "Lawyers have peculiar responsibilities for the just administration of the law, and these responsibilities include providing advice and representation for needy persons. To a degree not always appreciated by the public at large, the bar has performed these obligations with zeal and devotion. The Committee is persuaded, however, that a system of justice that attempts, in mid-twentieth century America, to meet the needs of the financially incapacitated accused through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate.... A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance.... We believe that fees for private appointed counsel should be set by the court within maximum limits established by the statute." Report of the Att'y Gen's Comm. on Poverty and the Administration of Criminal Justice 41-43 (1963).

40. "At present this representation [of those unable to pay usual fees] is being supplied in some measure through the spontaneous generosity of individual lawyers, through legal aid societies, and—increasingly—through the organized efforts of the Bar. If those who stand in need of this service know of its availability and their need is in fact adequately met, the precise mechanism by which this service is provided becomes of secondary importance. It is of great importance, however, that both the impulse to render this service, and the plan for making that impulse effective, should arise within the legal profession itself." *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1216 (1958).

41. "Free legal clinics carried on by the organized bar are not ethically objectionable. On the contrary, they serve a very worthwhile purpose and should be encouraged." *ABA Opinion* 191 (1939).

42. "Whereas the American Bar Association believes that it is a fundamental duty of the bar to see to it that all persons requiring legal advice be able to attain it, irrespective of their economic status....

"Resolved, that the Association approves and sponsors the setting up by state and local bar associations of lawyer referral plans and low-cost legal service methods for the purpose of dealing with cases of persons who might not otherwise have the benefit of legal advice...." *Proceedings of the House of Delegates of the American Bar Association,* Oct. 30, 1946, 71 A.B.A. Rep. 103, 109-10 (1946).

43. "The defense of indigent citizens, without compensation, is carried on throughout the country by lawyers representing legal aid societies, not only with the approval, but with the commendation of those acquainted with the work. Not infrequently services are rendered out of sympathy or for other philanthropic reasons, by individual lawyers who do not represent legal aid societies. There is nothing whatever in the Canons to prevent a lawyer from performing such an act, nor should there be." *ABA Opinion* 148 (1935).

44. *But cf.* ABA Canon 31.

45. "One of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public." *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1216 (1958).

One author proposes the following proposition to be included in "A Proper Oath for Advocates": "I recognize that it is sometimes difficult for clients with unpopular causes to obtain proper legal representation. I will do all that I can to assure that the client with the unpopular cause is properly represented, and that the lawyer representing such a client receives credit from and support of the bar for handling such a matter." Thode, *The Ethical Standard for the Advocate,* 39 Texas L. Rev. 575, 592 (1961).

" § 6068.... It is the duty of an attorney:

....

"(h) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed." Cal. Business and Professions Code § 6068 (West 1962). Virtually the same language is found in the Oregon statutes at Ore. Rev. Stats. Ch. 9 § 9.460(8).

See Rostow, *The Lawyer and His Client,* 48 A.B.A.J. 25 and 146 (1962).

46. *See* ABA Canons 7 and 29.

"We are of the opinion that it is not professionally improper for a lawyer to accept employment to compel another lawyer to honor the just claim of a layman. On the contrary, it is highly proper that he do so. Unfortunately, there appears to be a widespread feeling among laymen that it is difficult, if not impossible, to obtain justice when they have claims against members of the Bar because other lawyers will not accept employment to proceed against them. The honor of the profession, whose members proudly style themselves officers of the court, must surely be sullied if its members bind themselves by custom to refrain from enforcing just claims of laymen against lawyers." *ABA Opinion* 144 (1935).

47. ABA Canon 4 uses a slightly different test, saying, "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason...."

48. *Cf.* ABA Canon 7.

49. *See* ABA Canon 5.

50. Dr. Johnson's reply to Boswell upon being asked what he thought of "supporting a cause which you know to be bad" was: "Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it; and if it does convince him, why, then, Sir, you are wrong, and he is right." 2 Boswell, The Life of Johnson 47-48 (Hill ed. 1887).

51. "The lawyer deciding whether to undertake a case must be able to judge objectively whether he is capable of handling it and whether he can assume its burdens without prejudice to previous commitments...." *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1158, 1218 (1958).

52. "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong." ABA Canon 30.

53. *See* ABA Canon 7.

54. *Id.*

"From the facts stated we assume that the client has discharged the first attorney and given notice of the discharge. Such being the case, the second attorney may properly accept employment. *Canon 7; Opinions 10, 130, 149.*" *ABA Opinion* 209 (1941).

55. *See* ABA Canon 44.

"I will carefully consider, before taking a case, whether it appears that I can fully represent the client within the framework of law. If the decision is in the affirmative, then it will take extreme circumstances to cause me to decide later that I cannot so represent him." Thode, *The Ethical Standard for the Advocate,* 39 Texas L. Rev. 575, 592 (1961) (from "A Proper Oath for Advocates").

56. *ABA Opinion* 314 (1965) held that a lawyer should not disassociate himself from a cause when "it is obvious that the very act of disassociation would have the effect of violating *Canon 37.*"

57. ABA Canon 44 enumerates instances in which "...the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer."

58. *See* ABA Canon 44.

Footnotes 59-69. Deleted because of amendments to Canon 2.

70. *Cf.* ABA Canons 28.

Footnotes 71-86. Deleted because of amendments to Canon 2.

87. *See* ABA Canon 12.

88. The charging of a "clearly excessive fee" is a ground for discipline. State ex rel. Nebraska State Bar Ass'n. v. Richards. 165 Neb. 80, 90, 84 N.W.2d 136, 143 (1957).

"An attorney has the right to contract for any fee he chooses so long as it is not excessive (see Opinion 190), and this Committee is not concerned with the amount of such fees unless so excessive as to constitute a misappropriation of the client's funds (see Opinion 27)." *ABA Opinion* 320 (1968).

Cf. ABA Opinions 209 (1940), 190 (1939), and 27 (1930) and State ex rel. Lee v. Buchanan, 191 So.2d 33 (Fla. 1966).

89. *Cf.* ABA Canon 13; *see generally* MacKinnon, Contingent Fees for Legal Services (1964) (A Report of the American Bar Foundation).

90. "Contingent fees, whether in civil or criminal cases are a special concern of the law....

"In criminal cases, the rule is stricter because of the danger of corrupting justice. The second part of Section 542 of the Restatement [of Contracts] reads; 'A bargain to conduct a criminal case...in consideration of a promise of a fee contingent on success is illegal....'" Peyton v. Margiotti, 398 Pa. 86, 156 A.2d 865, 967 (1959).

"The third area of practice in which the use of the contingent fee is generally considered to be prohibited is the prosecution and defense of crim-

inal cases. However, there are so few cases, and these are predominantly old, that it is doubtful that there can be said to be any current law on the subject.... In the absence of cases on the validity of contingent fees for defense attorneys, it is necessary to rely on the consensus among commentators that such a fee is void as against public policy. The nature of criminal practice itself makes unlikely the use of contingent fee contracts." MacKinnon, Contingent Fees for Legal Services 52 (1964) (A Report of the American Bar Foundation).

91. *See* ABA Canon 34 and *ABA Opinions* 316 (1967) and 294 (1958); *see generally ABA Opinions* 265 (1945), 204 (1940), 190 (1939), 171 (1937), 153 (1936), 97 (1933), 63 (1932), 28 (130), 27 (1930), and 18 (1930).

92. "*Canon 12* contemplates that a lawyer's fee should not exceed *the value of the services* rendered....

"*Canon 12* applies, whether joint or separate fees are charged [by associate attorneys]...." *ABA Opinion* 204 (1940).

93. "[A] general covenant restricting an employed lawyer, after leaving the employment, from practicing in the community for a stated period, appears to this Committee to be an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status. Accordingly, the Committee is of the opinion it would be improper for the employing lawyer to require the covenant and likewise for the employed lawyer to agree to it." *ABA Opinion* 300 (1961).

94. *See* ABA Canon 30.

"*Rule 13*.... A member of the State Bar shall not accept employment to prosecute or defend a case solely out of spite, or solely for the purpose of harassing or delaying another...." Cal. Business and Professions Code § 6067 (West 1962).

95. *Cf.* ABA Canon 44.

96. *See also* Code of Professional Responsibility, DR 5-102 and DR 5-105.

97. *Cf.* ABA Canon 4.

98. *Cf.* Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), *rehearing denied*, 388 U.S. 924, 18 L. Ed.2d 1377, 87 S. Ct. 2094 (1967).

The American Bar Association Provisions

The following is the text of the American Bar Association Canon 2 provisions which were amended by the District of Columbia Court of Appeals. The provisions are supplied for information purposes only and are not effective in the District of Columbia.

ETHICAL CONSIDERATIONS

EC 2-1 The need of members of the public for legal services[1] is met only if they recognize their legal problems, appreciate the importance of seeking assistance,[2] and are able to obtain the services of acceptable legal counsel.[3] Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.[4]

Recognition of Legal Problems

EC 2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications[5] and participation in seminars, lectures, and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers. The problems of advertising on television require special consideration, due to the style, cost, and transitory nature of such media. If the interests of laypersons in receiving relevant lawyer advertising are not adequately served by print media and radio advertising, and if adequate safeguards to protect the public can reasonably be formulated, television advertising may serve a public interest.

EC 2-3 Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances.[6] The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems.[7] The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers in-person advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result.[8] A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.[9]

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solu-

tion applicable to all apparently similar individual problems,[10] since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be mislead and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.[11]

Selection of a Lawyer

EC 2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices.[12] The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.[13] Lack of information about the availability of lawyers, the qualifications of particular lawyers, and the expense of legal representation leads laypersons to avoid seeking legal advice.

EC 2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.[14] Advertisements and public communications, whether in law lists, telephone directories, newspapers, other forms of print media, television or radio, should be formulated to convey only information that is necessary to make an appropriate selection. Such information includes: (1) office information, such as, name, including name of law firm and names of professional associates; addresses; telephone numbers; credit card acceptability; fluency in foreign languages; and office hours; (2) relevant biographical information; (3) description of the practice, but only by using designations and definitions authorized by [the agency having jurisdiction of the subject under state law], for example, one or more fields of law in which the lawyer or law firm practices; a statement that practice is limited to one or more fields of law; and/or a statement that the lawyer or law firm specializes in a particular field of law practice, but only by using designations, definitions and standards authorized by [the agency having jurisdiction of the subject under state law]; and (4) permitted fee information. Self-laudation should be avoided.

Selection of a Lawyer: Lawyer Advertising

EC 2-9 The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in lawyer advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service, which cannot be measured or verified. Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to compare the qualifications of the lawyers available to represent him. A lawyer should strive to communicate such information without undue emphasis upon style and advertising strategems which serve to hinder rather than to facilitate intellient selection of counsel. Because technological change is a recurrent feature of communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cast in rigid, unchangeable terms. Machinery is therefore available to advertisers and consumers for prompt consideration of proposals to change the rules governing lawyer advertising. The determination of any request for such change should depend upon whether the proposal is necessary in light of existing Code provisions, whether the proposal accords with standards of accuracy, reliability and truthfulness, and whether the proposal would facilitate informed selection of lawyers by potential consumers of legal services. Representatives of lawyers and consumers should be heard in addition to the applicant concerning any proposed change. Any change which is approved should be promulgated in the form of an amendment to the Code so that all lawyers practicing in the jurisdiction may avail themselves of its provisions.

EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process.[15] The use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder.[16] Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby.[17] However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm name,[18] and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC 2-13 In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status.[19] He should not hold himself out as being a partner or associate of a law firm if he is not one in fact,[20] and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.[21]

EC 2-14 In some instances a lawyer confines his practice to a particular field of law.[22] In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having official recognition

as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate in permitted advertising, if it is factual, a limitation of his practice or one or more particular areas or fields of law in which he practices using designations and definitions authorized for that purpose by [the state agency having jurisdiction]. A lawyer practicing in a jurisdiction which certifies specialists must also be careful not to confuse laypersons as to his status. If a lawyer discloses areas of law in which he practices or to which he limits his practice, but is not certified in [the jurisdiction] he, and the designation authorized in [the jurisdiction], should avoid any implication that he is in fact certified.

EC 2-15 The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

DISCIPLINARY RULES

DR 2-101 Publicity.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
(3) Date and place of birth;
(4) Date and place of admission to the bar of state and federal courts;
(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
(6) Public or quasi-public offices;
(7) Military service;
(8) Legal authorships;
(9) Legal teaching positions;
(10) Memberships, offices, and committee assignments, in bar associations;
(11) Membership and offices in legal fraternities and legal societies;
(12) Technical and professional licenses;
(13) Memberships in scientific, technical and professional associations and societies;
(14) Foreign language ability;
(15) Names and addresses of bank references;
(16) With their written consent, names of clients regularly represented;
(17) Prepaid or group legal services programs in which the lawyer participates;
(18) Whether credit cards or other credit arrangements are accepted;
(19) Office and telephone answering service hours;
(20) Fee for an initial consultation;
(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upont he number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
(25) Fixed fees for specific legal services,* the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

(C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to [the agency having jurisdiction under state law]. Any such application shall be served upon [the agencies having jurisdiction under state law over the regulation of the legal profession and consumer matters] who shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers.**

(D) If the advertisement is communicated to the public over television or radio, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer.

(E) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(F) Unless otherwise specified in the advertisement if a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(G) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101(B), the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(H) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
(2) In public notices when the name and profession of a lawyer are re-

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***The agency having jurisdiction under state law may desire to issue appropriate guidelines defining "specific legal services."**

****The agency having jurisdiction under state law should establish orderly and expeditious procedures for ruling on such applications.**

quired or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(I) A lawyer shall not compensate or give any thing of value to representative of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

DR 2-102 Professional Notices, Letterheads and Offices.

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives.[59] It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer.[60] It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.[61]

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates,[62] and names and dates relating to deceased and retired members.[63] A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client.[64] The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.[65] A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm,[66] and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.[67]

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers or professional corporations unless they are in fact partners.[68]

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions;[69] however, the same firm name may be used in each jurisdiction.

(E) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

DR 2-103 Recommendation of Professional Employment.[70]

(A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner,[71] of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.[72]

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment[73] by a client, or as a reward for having made a recommendation resulting in his employment[74] by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner,[75] except as authorized in DR 2-101, and except that

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.[76]

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.[77]

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries[78] provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such

organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

DR 2-104 Suggestion of Need of Legal Services.[79] [80]

(A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice,[81] except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.[82]

(2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics[83] so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.[84]

DR 2-105 Limitation of Practice.[85]

(A) A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice permitted under DR 2-101(B), except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.

(2) A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by [the agency having jurisdiction of the subject under state law].

(3) A lawyer who is certified as a specialist in a particular field of law or law practice by [the authority having jurisdiction under state law over the subject of specialization by lawyers] may hold himself out as such, but only in accordance with the rules prescribed by that authority.[86]

CANON 3
A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

ETHICAL CONSIDERATIONS

EC 3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC 3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC 3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards.[1] The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC 3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC 3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law.[2] Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where his professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC 3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product.[3] This delegation enables a lawyer to render legal service more economically and efficiently.

EC 3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC 3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman.[4] This does not mean, however, that the precuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs.[5] In like manner, profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper.[6] These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law.

EC 3-9 Regulation of the practice of law is accomplished principally by the respective states.[7] Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states.[8] In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.[9]

DISCIPLINARY RULES

DR 3-101 Aiding Unauthorized Practice of Law.[10]

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.[11]

(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.[12]

DR 3-102 Dividing Legal Fees with a Non-Lawyer.

(A) A lawyer or law firm shall not share legal fees with a non-lawyer,[13] except that:

(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.[14]

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit sharing arrangement,[15] providing such plan does not circumvent another Disciplinary Rule.[16]*

DR 3-103 Forming a Partnership with a Non-Lawyer.

(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.[17]

***Rule DR 3-102(A)(3) was revised by the American Bar Association in February 1980. Pursuant to the District of Columbia Court of Appeals rule X, the amendment is incorporated in the standards governing the practice of law in the District of Columbia.**

NOTES

1. "The condemnation of the unauthorized practice of law is designed to protect the public from legal services by persons unskilled in the law. The prohibition of lay intermediaries is intended to insure the loyalty of the lawyer to the client unimpaired by intervening and possibly conflicting interests." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. Rev. 438, 439 (1965).

2. What constitutes unauthorized practice of the law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction." *ABA Opinion 198* (1939).

"In the light of the historical development of the lawyer's functions, it is impossible to lay down an exhaustive definition of 'the practice of law' by attempting to enumerate every conceivable act performed by lawyers in the normal course of their work." State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz., 76, 87, 366 P.2d 1, 8-9 (1961), *modified*, 91 Ariz. 293, 371 P.2d 1020 (1962).

3. "A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scriveners, nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings a part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible to the client." *ABA Opinion* 316 (1967).

ABA Opinion 316 (1967) also stated that if a lawyer practices law as part of a law firm which includes lawyers from several states, he may delegate tasks to firm members in other states so long as he "is the person who on behalf of the firm, vouched for the work of all of the others and, with the client and in the courts, did the legal acts defined by that state as the practice of law."

"A lawyer cannot delegate his professional responsibility to a law student employed in his office. He may avail himself of the assistance of the student in many of the fields of the lawyer's work, such as examination of case law, finding and interviewing witnesses, making collections of claims, examining court records, delivering papers, conveying important messages, and other similar matters. But the student is not permitted, until he is admitted to the Bar, to perform the professional functions of a lawyer, such as conducting court trials, giving professional advice to clients or drawing legal documents for them. The student in all his work must act as agent for the lawyer employing him, who must supervise his work and be responsible for his good conduct." *ABA Opinions* 85 (1932).

4. "No division of fees for legal services is proper, except with another lawyer...." ABA Canon 34. Otherwise, according to *ABA Opinion* 316 (1967), "[t]he Canons of Ethics do not examine into the method by which such persons are remunerated by the lawyer.... They may be paid a salary, a per diem charge, a flat fee, a contract price, etc."

See ABA Canons 33 and 47.

5. "Many partnership agreements provide that the active partners, on the death of any one of them, are to make payments to the estate or to the nominee of a deceased partner on a pre-determined formula. It is only where the effect of such an arrangement is to make the estate or nominee a member of the partnership along with the surviving partners that it is prohibited by *Canon 34*. Where the payments are made in accordance with a pre-existing agreement entered into by the deceased partner during his lifetime and providing for a fixed method for determining their amount based upon the value of services rendered during the partner's life-time

and providing for a fixed period over which the payments are to be made, this is not the case. Under these circumstances, whether the payments are considered to be delayed payment of compensation earned but withheld during the partner's lifetime, or whether they are considered to be an approximation of his interest in matters pending at the time of his death, is immaterial. In either event, as Henry S. Drinker says in his book, Legal Ethics, at page 189: 'It would seem, however, that a reasonable agreement to pay the estate a proportion of the receipts for a reasonable period is a proper practical settlement for the lawyer's services to his retirement or death.'" *ABA Opinion* 308 (1963).

6. *Cf. ABA Opinion* 311 (1964).

7. "That the States have broad power to regulate the practice of law is, of course, beyond question." United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967).

"It is a matter of law, not of ethics, as to where an individual may practice law. Each state has its own rules." *ABA Opinion* 316 (1967).

8. "Much of clients' business crosses state lines. People are mobile, moving from state to state. Many metorpolitan areas cross state lines. It is common today to have a single economic and social community involving more than one state. The business of a single client may involve legal problems in several states." *ABA Opinion* 316 (1967).

9. "[W]e reaffirmed the general principle that legal services to New Jersey residents with respect to New Jersey matters may ordinarily be furnished only by New Jersey counsel; but we pointed out that there may be multistate transactions where strict adherence to this thesis would not be in the public interest and that, under the circumstances, it would have been not only more costly to the client but also 'grossly impractical and inefficient' to have had the settlement negotiations conducted by separate lawyers from different states." In re Estate of Waring, 47 N.J. 367, 376, 221 A.2d 193, 197 (1966).

Cf. ABA Opinion 316 (1967).

10. Conduct permitted by the Disciplinary Rules of Canons 2 and 5 does not violate DR 3-101.

11. *See* ABA Canon 47.

12. It should be noted, however, that a lawyer may engage in conduct, otherwise prohibited by this Disciplinary Rule, where such conduct is authorized by premptive federal legislation. *See* Sperry v. Florida, 373 U.S. 379, 10 L. Ed. 2d 428, 83 S. Ct. 1322 (1963).

13. *See* ABA Canon 34 and *ABA Opinions* 316 (1967), 180 (1938), and 48 (1931).

"The receiving attorney shall not under any guise or form share his fee for legal services with a lay agency, personal or corporate, without prejudice, however, to the right of the lay forwarder to charge and collect from the creditor proper compensation for non-legal services rendered by the law [*sic*] forwarder which are separate and apart from the services performed by the receiving attorney." *ABA Opinion* 294 (1958).

14. *See ABA Opinion* 266 (1945).

15. *Cf. ABA Opinion* 311 (1964).

16. *See* ABA *Opinion i1440.*

17. *See* ABA Canon 33; *cf.* ABA *Opinions* 239 (1942) and 201 (1940).

ABA Opinion 316 (1967) states that lawyers licensed in different jurisdictions may, under certain conditions, enter "into an arrangement for the practice of law" and that a lawyer licensed in State A is not, for such purpose, a layman in State B.

CANON 4
A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.[1] A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client.[2] A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and the important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure,[3] when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship.[4] Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes.[5] Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates.[6] Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another,[7] and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his em-

ployment.[8] Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets.[9] A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DISCIPLINARY RULES

DR 4-101 Preservation of Confidences and Secrets of a Client.[10]

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a laywer shall not knowingly:

(1) Reveal a confidence or secret of his client.[11]

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself[12] or of a third person,[13] unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.[14]

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.[15]

(3) The intention of his client to commit a crime[16] and the information necessary to prevent the crime.[17]

(4) Confidences or secrets necessary to establish or collect his fee[18] or to defend himself or his employees or associates against an accusation of wrongful conduct.[19]

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

NOTES

1. *See* ABA Canons 6 and 37 and *ABA Opinion* 287 (1953).

"The reason underlying the rule with respect to confidential communications between attorney and client is well stated in Mechem on Agency, 2d Ed., Vol. 2, § 2297, as follows: 'The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly priviledged;—that the attorney shall not be permitted, without the consent of his client,—and much less will he be compelled—to reveal or disclose communications made to him under such circumstances.'" *ABA Opinion* 250 (1943).

"While it is true that complete revelation of relevant facts should be encouraged for trial purposes, nevertheless an attorney's dealings with his client, if both are sincere, and if the dealings involve more than mere technical matters, should be immune to discovery proceedings. There must be freedom from fear of revealment of matters disclosed to an attorney because of the peculiarly intimate relationship existing." Ellis-Foster Co. v. Union Carbide & Carbon Corp., 159 F.Supp. 917, 919 (D.N.J. 1958).

Cf. ABA Opinions 314 (1965), 274 (1946) and 268 (1945).

2. "While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer. Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960).

Cf. ABA Opinion 150 (1936).

3. "Where... [a client] knowingly and after full disclosure participates in a [legal fee] financing plan which requires the furnishing of certain information to the bank, clearly by his conduct he has waived any privilege as to that information." *ABA Opinion* 320 (1968).

4. "The lawyer must decide when he takes a case whether it is a suitable one for him to undertake and after this decision is made, he is not justified in turning against his client by exposing injurious evidence entrusted to him.... [D]oing something intrinsically regrettable, because the only alternative involves worse consequences, is a necessity in every profession." Williston, Life and Law 271 (1940).

Cf. ABA Opinions 177 (1938) and 83 (1932).

5. *See* ABA Canon 11.

6. *See* ABA Canon 37.

7. *See* ABA Canons 6 and 37.

"[A]n attorney must not accept professional employment against a client or a former client which will, or even *may* require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment...." *ABA Opinion* 165 (1936).

8. *See* ABA Canon 37.

"Confidential communications between an attorney and his client, made because of the relationship and concerning the subject-matter of the attorney's employment, are generally privileged from disclosure without the consent of the client, and this privilege outlasts the attorney's employment. *Canon 37.*" *ABA Opinion* 154 (1936).

9. *Cf. ABA Opinion* 226 (1945).

10. *See* ABA Canon 37; *cf.* ABA Canon 6.

11. "§ 6068...It is the duty of an attorney:

....

"(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." Cal. Business and Professions Code § 6068 (West 1962). Virtually the same provision is found in the Oregon statutes. Ore. Rev. Stats. ch. 9 § 9.460(5).

"Communications between lawyer and client are privileged (Wigmore on Evidence, 3d Ed., Vol. 8, §§ 2290-2329). The modern theory underlying the privilege is subjective and is to give the client freedom of apprehension in consulting his legal adviser (*ibid.*, § 2290, p. 548). The privilege applies to communications made in seeking legal advice for any purpose (*ibid.*, § 2294, p. 563). The mere circumstance that the advice is given without charge therefore does not nullify the privilege (*ibid.*, ' 2303)." *ABA Opinion* 216 (1941).

"It is the duty of an attorney to maintain the confidence and preserve inviolate the secrets of his client...." *ABA Opinion* 155 (1936).

12. *See* ABA Canon 11.

"The provision respecting employment is in accord with the general rule announced in the adjudicated cases that a lawyer may not make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business, to his own advantage or profit (7 C.J.S., § 125, p. 958; Healy v. Gray, 184 Iowa 111, 168 N.W. 222; Baumgardner v. Hudson, D.C. App., 277 F. 552; Goodrum v. Clement, D.C. App., 277 F. 586)." *ABA Opinion* 250 (1943).

13. *See ABA Opinion* 177 (1938).

14. "[A lawyer] may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless he is authorized to do so by the client (People v. Gerold, 265 Ill. 448, 107 N.E. 165, 178; Murphy v. Riggs, 238 Mich. 151, 213 N.WW. 110, 112; Opinion of this Committee, No. 91)." *ABA Opinion* 202 (1940).

Cf. ABA Opinion 91 (1933).

15. "A defendant in a criminal case when admitted to bail is not only regarded as in the custody of his bail, but he is also in the custody of the law, and admission to bail does not deprive the court of its inherent power to deal with the person of the prisoner. Being in lawful custody, the defendant is guilty of an escape when he gains his liberty before he is delivered in due process of law, and is guilty of a separate offense for which he may be punished. In failing to dislcose his client's whereabouts as a fugitive under these circumstances the attorney would not only be aiding his client to escape trial on the charge for which he was indicted, but would likewise be aiding him in evading prosecution for the additional offense of escape.

"It is the opinion of the committee that under such circumstances the attorney's knowledge of his client's whereabouts is not privileged, and that he may be disciplined for failing to disclose that information to the proper authorities...." *ABA Opinion* 155 (1936).

"We held in *Opinion* 155 that a communication by a client to his attorney in respect to the future commission of an unlawful act or to a continuing wrong is not privileged from disclosure. Public policy forbids that the relation of attorney and client should be used to conceal wrongdoing on the part of the client.

....

"When an attorney representing a defendant in a criminal case applies on his behalf for probation or suspension of sentence, he represents to the court, by implication at least, that his client will abide by the terms and conditions of the court's order. When that attorney is later advised of a violation of that order, it is his duty to advise his client of the consequences of his act, and endeavor to prevent a continuance of the wrongdoing. If his client thereafter persists in violating the terms and conditions of his probation, it is the duty of the attorney as an officer of the court to advise the proper authorities concerning his client's conduct. Such information, even though coming to the attorney from the client in the course of his professional relations with respect to other matters in which he represents the defendant, is not privileged from disclosure...." *ABA*

See ABA Opinion 155 (1936).

16. *ABA Opinion* 314 (1965) indicates that a lawyer must disclose even the confidences of his clients if "the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed."

See ABA Opinions 155 (1936).

17. *See* ABA Canon 37 and *ABA Opinion* 202 (1940).

18. *Cf. ABA Opinion* 250 (1943).

19. *See* ABA Canon 37 and *ABA Opinions* 202 (1940) and 19 (1930).

"[T]he adjudicated cases recognize an exception to the rule [that a lawyer shall not reveal the confidences of his client], where disclosure is necessary to protect the attorney's interests arising out of the relation of attorney and client in which disclosure was made.

"The exception is stated in Mechem on Agency, 2d Ed., Vol. 2, § 2313, as follows: 'But the attorney may disclose information received from the client when it becomes necessary for his own protection, as if the client should bring an action against the attorney for negligence or misconduct, and it became necessary for the attorney to show what his instructions were, or what was the nature of the duty which the client expected him to perform. So if it became necessary for the attorney to bring an action against the client, the client's privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights.'

"Mr. Jones, in his Commentaries on Evidence, 2d Ed., Vol. 5, § 2165, states the exception thus: 'It has frequently been held that the rule as to privileged communications does not apply when litigation arises between attorney and client to the extent that their communications are relevant to the issue. In such cases, if the disclosure of privileged communications becomes necessary to protect the attorney's rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. In such cases the attorney is exempted from the obligations of secrecy.'" *ABA Opinion* 250 (1943)

CANON 5
A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.[1] Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client.[2] After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC 5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

EC 5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances.[3] Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.[4]

EC 5-6 A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.[5]

EC 5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation.[6] However, it is not

improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement[7] gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

EC 5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client.[8] Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action,[9] but the ultimate liability for such costs and expenses must be that of the client.

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment[10] Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue.[11] In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness.[12] In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment.[13] Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.[14]

EC 5-11 A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed.[15] In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

EC 5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.[16]

EC 5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

Interests of Multiple Clients

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client.[17] This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.[18]

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests;[19] and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires.[20] Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent.[21] If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.[22]

EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer,[23] and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

EC 5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if

the lawyer is convinced that differing interests are not present.

EC 5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty.[24] Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

EC 5-20 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

Desires of Third Persons

EC 5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment.[25] The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client;[26] and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC 5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC 5-23 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the action of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.[27]

EC 5-24 To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law,[28] if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

DISCIPLINARY RULES

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.[29]

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.[30]

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.[31]

DR 5-103 Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client,[32] except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.[33]

(B) While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to his or her client, except that a lawyer may pay, advance or guarantee the expenses of litigation or administrative proceedings, including court costs, expenses of investi-

gation, expenses of medical examination, and costs of obtaining and presenting evidence.*

DR 5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment,[32] or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).[34]

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).[37]

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, other than DR 2-110(B)(3) or (B)(4) or DR 6-101(A)(1), or, in appropriate cases, DR 5-101(A), no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment, provided that any imputed disqualification or restrictions that attach because a lawyer was a public employee shall be determined under Canon 9.**

DR 5-106 Settling Similar Claims of Clients.[38]

(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR 5-107 Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:
  (1) Accept compensation for his legal services from one other than his client.
  (2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.[39]

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.[40]

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
  (1) A non-lawyer owns any interest therein,[41] except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
  (2) A non-lawyer is a corporate director or officer thereof;[42] or
  (3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.[43]

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* The provision is as amended by the District of Columbia Court of Appeals, April 18, 1980. As adopted by the American Bar Association, DR 5-103(B) states:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

**DR 5-105(D), as set forth above, was revised by the District of Columbia Court of Appeals by Order of July 28, 1981. Prior to that revision DR 5-105(D) was identical to the ABA version, which reads as follows:

> If a lawyer is required to decline employment or withdraw from employment under the Disciplinary Rules, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

NOTES

1. *Cf.* ABA Canon 35.

"[A lawyer's] fiduciary duty is of the highest order and he must not represent interests adverse to those of the client. It is true that because of his professional responsibility and the confidence and trust which his client may legitimately repose in him, he must adhere to a high standard of honesty, integrity and good faith in dealing with his client. He is not permitted to take advantage of his position or superior knowledge to impose upon the client; nor to conceal facts or law, nor in any way deceive him without being held responsible therefor." Smoot v. Lund, 13 Utah 2d 168, 172, 369 P.2d 933, 936 (1962).

"When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the individed loyalty of the one upon whom he looks as his advocate and champion. If, as in this case, he is sued and his home attached by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the profession is exposed to the charge that it is interested only in money." Grievance Comm. v. Rattner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964).

"One of the cardinal principles confronting every attorney in the representation of a client is the requirement of complete loyalty and service in good faith to the best of his ability. In a criminal case the client is entitled to a fair trial, but not a perfect one. These are fundamental requirements of due process under the Fourteenth Amendment.... The same principles are applicable in Sixth Amendment cases (not pertinent herein) and suggest that an attorney should have no conflict of interest and that he must devote his full and faithful efforts toward the defense of his client." Johns v. Smyth, 176 F. Supp. 949, 952 (E.D. Va. 1959), *modified*, United States ex rel. Wilkins v. Banmiller, 205 F. Supp. 123, 128 n. 5 (E.D. Pa. 1962), *aff'd*, 325 F.2d 514 (3d Cir. 1963), *cert. denied*, 379 U.S. 847, 13 L.Ed. 2d 51, 85 S.Ct. 87 (1964).

2. "Attorneys must not allow their private interests to conflict with those of their clients.... They owe their entire devotion to the interests of their clients." United States v. Anonymous, 215 F. Supp. 111, 113 (E.D. Tenn. 1963).

"[T]he court [below] concluded that a firm may not accept any action against a person whom they are presently representing even though there is no relationship between the two cases. In arriving at this conclusion, the court cites an opinion of the Committee on Professional Ethics of the New York County Lawyers' Association which stated in part: 'While under the circumstances *** there maybe no actual conflict of interest*** "maintenance of public confidence in the Bar requires an attorney who has accepted representation of a client to decline, while representing such client, any employment from an adverse party in any matter even though wholly unrelated to the original retainer." See Question and Answer No. 350, N.Y. County L. Ass'n, Questions and Answer No. 450 (June 21, 1956).'" Grievance Comm. v. Rattner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964).

3. "Courts of equity will scrutinize with jealous vigilance transactions between parties occupying fiduciary relations toward each other.... A deed will not be held invalid, however, if made by the grantor with full knowledge of its nature and effect, and because of the deliberate, volun-

tary and intelligent desire of the grantor.... Where a fiduciary relation exists, the burden of proof is on the grantee or beneficiary of an instrument executed during the existence of such relationship to show the fairness of the transaction, that it was equitable and just and that it did not proceed from undue influence.... The same rule has application where an attorney engages in a transaction with a client during the existence of the relation and is benefited thereby.... Conversely, an attorney is not prohibited from dealing with his client or buying his property, and such contracts, if open, fair and honest, when deliberately made, are as valid as contracts between other parties.... [I]mportant factors in determining whether a transaction is fair include a showing by the fiduciary (1) that he made a full and frank disclosure of all the relevant information that he had; (2) that the consideration was adequate; and (3) that the principal had independent advice before completing the transaction." McFail v. Braden, 19 Ill. 2d 108, 117-18, 166 N.E. 2d 46, 52 (1960).

4. See State ex rel. Nebraska State Bar Ass'n v. Richards, 165 Neb. 80, 94-95, 84 N.W. 2d 136, 146 (1957).

5. *See* ABA Canon 9.

6. *See* ABA Canon 10.

7. *See* Code of Professional Responsibility, EC 2-20.

8. *See* ABA Canon 42.

9. "*Rule 3a*.... A member of the State Bar shall not directly or indirectly pay or agree ot pay, or represent or sanction the representation that he will pay, medical, hospital or nursing bills or other personal expenses incurred by or for a client, prospective or existing; provided this rule shall not prohibit a member:

"(1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or

(2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or

(3) from advancing the costs of prosecuting or defending a claim or action. Such costs within the meaning of this subparagraph (3) include all taxable costs or disbursements, costs or investigation costs of obtaining and presenting evidence." Cal. Business and Professions Code §6076 West Supp. 1967).

10. "When a lawyer knows, prior to trial, that he will be a necessary witness, except as to merely formal matters such as identification or custody of a document or the like, neither he nor his firm or associates should conduct the trial. If, during the trial, he discovers that the ends of justice require his testimony, he should, from that point on, if feasible and not prejudicial to his client's case, leave further conduct of the trial to other counsel. If circumstances do not permit withdrawal from the conduct of the trial, the lawyer should not argue the credibility of his own testimony." *A Code of Trial Conduct: Promulgated by the American College of Trial Lawyers,* 43 A.B.A.J. 223, 224-25 (1957).

11. *Cf.* Canon 19: "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel."

12. "It is the general rule that a lawyer may not testify in litigation in which he is an advocate unless circumstances arise which could not be anticipated and it is necessary to prevent a miscarriage of justice. In those rare cases where the testimony of an attorney is needed to protect his client's interests, it is not only proper but mandatory that it be forthcoming." Schwartz v. Wenger, 267 Minn. 40, 43-44, 124 N.W. 2d 489, 492 (1963).

13. "The great weight of authority in this country holds that the attorney who acts as counsel and witness, in behalf of his client, in the same cause on a material matter, not of a merely formal character, and not in an emergency, but having knowledge that he would be required to be a witness in ample time to have secured other counsel and given up his service in the case, violates a highly important provision of the Code of Ethics and a rule of professional conduct, but does not commit a legal error in so testifying, as a result of which a new trial will be granted." Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 499, 141A. 866, 869 (1928).

14. "[C]ases may arise, and in practice often do arise, in which there would be a failure of justice should the attorney withhold his testimony. In such a case it would be a vicious professional sentiment which would deprive the client of the benefit of his attorney's testimony." Connolly v. Straw, 53 Wis. 645, 649, 11 N.W. 17, 19 (1881).

But see Canon 19: "Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

15. *Cf.* ABA Canon 7.

16. *See* ABA Canon 7.

17. *See* ABA Canon 6; *cf. ABA Opinions* 261 (1944), 242 (1942), 142 (1935), and 30 (1931).

18. The ABA Canons speak of "conflicting interests" rather than "differing interests" but make no attempt to define such other than the statement in Canon 6: "Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

19. "Canon 6 of the Canons of Professional Ethics, adopted by the American Bar Association on September 30, 1937, and by the Pennsylvania Bar Association on January 7, 1938, provides in part that 'It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires to him to oppose.' The full disclosure required by this canon contemplates that the possibly adverse effect of the conflict be fully explained by the attorney to the client to be affected and by him thoroughly understood....

"The foregoing canon applies to cases where the circumstances are such that possibly conflicting interests may permissibly be represented by the same attorney. But manifestly, there are instances where the conflicts of interest are so critically adverse as not to admit of one attorney's representing both sides. Such is the situation which this record presents. No one could conscionably contend that the same attorney may represent both the plaintiff and defendant in an adversary action. Yet, that is what is being done in this case." Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 235, 135 A.2d 252, 254 (1957), *cert. denied,* 355 U.S. 966, 2 L. Ed. 2d 541, 78 S. Ct. 557 (1958).

20. "Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel of Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 75-76, 86 L. Ed. 680, 702 S. Ct. 457, 467 (1942).

21. *See* ABA Canon 6.

22. *Id.*

23. *Cf. ABA Opinion* 282 (1950).

"When counsel, although paid by the casualty company, undertakes to represent the policyholder and files his notice of appearance, he owes to his client, the assured, an undeviating and single allegiance. His fealty embraces the requirement to produce in court all witnesses, fact and expert, who are available and necessary for the proper protection of the rights of his client....

"... The Canons of Professional Ethics make it pellucid that there are not two standards, one applying to counsel privately retained by a client, and the other to counsel paid by an insurance carrier." American Employers Ins. Co. v. Goble Aircraft Specialties, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (1954), *motion to withdraw appeal granted,* 1 App. Div. 2d 1008, 154 N.Y. S.2d 835 (1956).

"[C]ounsel, selected by State Farm to defend Dorothy Walker's suit for $50,000 damages, was apprised by Walker that his earlier version of the accident was untrue and that actually the accident occurred because he lost control of his car in passing a Cadillac just ahead. At that point, Walker's counsel should have refused to participate further in view of the conflict of interest between Walker and State Farm.... Instead he participated in the ensuing deposition of the Walkers, even took an *ex parte* sworn statement from Mr. Walker in order to advise State Farm what action it should take, and later used the statement against Walker in the District Court. This action appears to contravene an Indiana attorney's duty 'at every peril to himself, to preserve the secrets of his client'...." State Farm Mut. Auto Ins. Co. v. Walker, 382 F.2d 548, 552 (1967), *cert. denied,* 389 U.S. 1045, 19 L. Ed. 2d 837, 88 S. Ct. 789 (1968).

24. *See* ABA Canon 6.

25. *See* ABA Canon 35.

"Objection to the intervention of a lay intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship,... derives from the element of pecuniary gain. Fearful of dangers thought to arise from that element, the courts of several States have sustained regulations aimed at these activities. We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed. It is enough that the superficial resemblance in form between those arrangements and that at bar cannot obscure the vital fact that here the entire arrangement employs constitutionally privileged means of expression to secure consti-

tutionally guaranteed civil rights." NAACP v. Button, 371 U.S. 415, 441-42, 9 L. Ed. 2d 405, 423-24, 83 S. Ct. 328, 342-43 (1963).

26. *Cf.* ABA Canon 38.

27. "Certainly it is true that 'the professional relationship between an attorney and his client is highly personal, involving an intimate appreciation of each individual client's particular problem.' And this Committee does not condone practices which interfere with that relationship. However, the mere fact the lawyer is actually paid by some entity other than the client does not affect that relationship, so long as the lawyer is selected by and is directly responsible to the client. See Informal Opinions 469 and 679. Of course, as the latter decision points out, there must be full disclosure of the arrangement by the attorney to the client...." *ABA Opinion* 320 (1968).

"[A] third party may pay the cost of legal services as long as control remains in the client and the responsibility of the lawyer is solely to the client. Informal Opinions 469 ad [*sic*] 679. *See also Opinion* 237." *Id.*

28. *ABA Opinion* 303 (1961) recognized that "[s]tatutory provisions now exist in several states which are designed to make [the practice of law in a form that will be classified as a corporation for federal income tax purposes] legally possible, either as a result of lawyers incorporating or forming associations with various corporate characteristics."

29. *Cf.* ABA Canon 6 and *ABA Opinions* 181 (1938), 104 (1934), 103 (1933), 72 (1932), 50 (1931), 49 (1931), and 33 (1931).

"New York County [Opinion] 203.... [A lawyer] should not advise a client to employ an investment company in which he is interested, without informing him of this." Drinker, Legal Ethics 956 (1953).

"In *Opinions* 72 and 49 this Committee held: The relations of partners in a law firm are such that neither the firm nor any member or associate thereof, may accept any professional employment which any member of the firm cannot properly accept.

"In *Opinion* 16 this Committee held that a member of a law firm could not represent a defendant in a criminal case which was being prosecuted by another member of the firm who was public prosecuting attorney. The Opinion stated that it was clearly unethical for one member of the firm to oppose the interest of the state while another member represented those interests.... Since the prosecutor himself could not represent both the public and the defendant, no member of his law firm could either." *ABA Opinion* 296 (1959).

30. *Cf.* ABA Canon 19 and *ABA Opinions* 220 (1941), 185 (1938), 50 (1931), and 33 and (1931); *but cf.* Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 498-99, 141 A. 866, 868 (1928).

31. This *Canon* [19] *of Ethics* needs no elaboration to be applied to the facts here. Apparently, the object of this precept is to avoid putting a lawyer in the obviously embarrassing predicament of testifying and then having to argue the credibility and effect of his own testimony. It was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel." Galarowicz v. Ward, 119 Utah 611, 620, 230 P.2d 576, 580 (1951).

32. ABA Canon 10 and *ABA Opinions* 279 (1949), 246 (1942), and 176 (1938).

33. *See* Code of Professional Responsibility, DR 2-106(C).

Footnote 34 deleted because of amendments to Canon 5.

35. *See* ABA Canon 6; *cf. ABA Opinions* 167 (1937), 60 (1931), and 40 (1931).

36. *ABA Opinion* 247 (1942) held that an attorney could not investigate a night club shooting on behalf of one of the owner's liability insurers, obtaining the cooperation of the owner, and later represent the injured patron in an action against the owner and a different insurance company unless the attorney obtain the "express consent of all concerned given after a full disclosure of the facts," since to do so would be to represent conflicting interests.

See ABA Opinions 247 (1942), 224 (1941), 222 (1941), 218 (1941), 112 (1934), 86 (1932), and 83 (1932).

37. *Cf. ABA Opinions* 231 (1941) and 160 (1936).

38. *Cf. ABA Opinions* 235 (1941).

39. *See* ABA Canon 38.

"A lawyer who receives a commission (whether delayed or not) from a title insurance company or guaranty fund for recommending or selling the insurance to his client, or for work done for the client or the company, without either fully disclosing to the client his financial interest in the transaction, or crediting the client's bill with the amount thus received, is guilty of unethical conduct." *ABA Opinion* 304 (1962).

40. *See* ABA Canon 35; *cf. ABA Opinion* 237 (1941).

"When the lay forwarder, as agent for the creditor, forwards a claim to an attorney, the direct relationship of attorney and client shall then exist between the attorney and the creditor, and the forwarder shall not interpose itself as an intermediary to control the activities of the attorney." *ABA Opinion* 294 (1958).

41. "Permanent beneficial and voting rights in the organization set up to practice law, whatever its form, must be restricted to lawyers while the organization is engaged in the practice of law." *ABA Opinion* 303 (1961).

42. "*Canon 33*...promulgates underlying principles that must be observed no matter in what form of organization lawyers practice law. Its requirement that no person shall be admitted or held out as a practitioner or member who is not a member of the legal profession duly authorized to practice, and amenable to professional discipline, makes it clear that any centralized management must be in lawyers to avoid a violation of this Canon." *ABA Opinion* 303 (1961).

43. "There is no intervention of any lay agency between lawyer and client when centralized management provided only by lawyers may give guidance or direction to the services being rendered by a lawyer-member of the organization to a client. The language in *Canon 35* that a lawyer should avoid all relations which direct the performance of his duties by or in the interest of an intermediary refers to lay intermediaries and not lawyer intermediaries with whom he is associated in the practice of law." *ABA Opinion* 303 (1961).

CANON 6
A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC 6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice[1] and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast current legal literature and developments, participating in continuing legal education programs,[2] concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC 6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified.[3] However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC 6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC 6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC 6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

DISCIPLINARY RULES

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.[5]

DR 6-102 Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

NOTES

1. "[W]hen a citizen is faced with the need for a lawyer, he wants, and is entitled to, the best informed counsel he can obtain. Changing times produce changes in our laws and legal procedures. The natural complexities of law require continuing intensive study by a lawyer if he is to render his clients a maximum of efficient service. And, in so doing, he maintains the high standards of the legal profession; and he also increases respect and confidence by the general public." Rochelle & Payne, *The Struggle for Public Understanding*, 25 Texas B.J. 109, 160 (1962).

"We have undergone enormous changes in the last fifty years within the lives of most of the adults living today who may be seeking advice. Most of these changes have been accompanied by changes and developments in the law.... Every practicing lawyer encounters these problems and is often perplexed with his own inability to keep up, not only with changes in the law, but also with changes in the lives of his clients and their legal problems.

"To be sure, no client has a right to expect that his lawyer will have all of the answers at the end of his tongue or even in the back of his head at all times. But the client does have the right to expect that the lawyer will have devoted his time and energies to maintaining and improving his competence to know where to look for the answers, to know how to deal with the problems, and to know how to advise to the best of his legal talents and abilities." Levy & Sprague, *Accounting and Law: Is Dual Practice in the Public Interest?*, 52 A.B.A.J. 1110, 1112 (1966).

2. "The whole purpose of continuing legal education, so enthusiastically supported by the ABA, is to make it possible for lawyers to make themselves better lawyers. But there are no nostrums for proficiency in the law; it must come through the hard work of the lawyer himself. To the extent that that work, whether it be in attending institutes or lecture courses, in studying after hours or in the actual day in and day out practice of his profession, can be concentrated within a limited field, the greater the proficiency and expertness that can be developed." *Report of the Special Committee on Specialization and Specialized Legal Education*, 79 A.B.A. Rep. 582, 588 (1954).

3. "If the attorney is not competent to skillfully and properly perform the work, he should not undertake the service." Degen v. Steinbrink, 202 App. Div. 477, 481, 195 N.Y.S. 810, 814 (1922), *aff'd mem.*, 236 N.Y. 669 142 N.E. 328 (1923).

4. *See ABA Opinion* 303 (1961); *cf.* Code of Professional Responsibility, EC 2-11.

5. The annual report for 1967-1968 of the Committee on Grievances of the Association of the Bar of the City of New York showed a receipt of 2,232 complaints; of the 828 offenses against clients, 76 involved conversion, 49 involved "overreaching," and 452, or more than half of all such offenses, involved neglect. *Annual Report of the Committee on Grievances of the Association of the Bar of the City of New York*, N.Y.L.J., Sept. 12, 1968, at 4, col. 5.

CANON 7
A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

ETHICAL CONSIDERATIONS

EC 7-1 The duty of a lawyer, both to his client[1] and to the legal system, is to represent his client zealously[2] within the bounds of the law,[3] which includes Disciplinary Rules and enforceable professional regulations.[4] The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law;[5] to seek any lawful objective[6] through legally permissible means;[7] and to present for adjudication any lawful claim, issue, or defense.

EC 7-2 The bounds of the law in a given case are often difficult to ascertain.[8] The language of legislative encactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC 7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different.[9] In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law.[10] In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Duty of the Lawyer to a Client

EC 7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.[11] His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.[12]

EC 7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision.[13] He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.[14]

EC 7-6 Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

EC 7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.[15]

EC 7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations.[16] A lawyer should advise his client of the possible effect of each legal alternative.[17] A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint.[18] In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.[19] He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.[20]

EC 7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter,[21] a lawyer should always act in a manner consistent with the best interest of his cient.[22] However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.[23]

EC 7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

EC 7-12 Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.[24] This special duty exits because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

EC 7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC 7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be *ex parte* in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. A lawyer appearing before an administrative agency,[25] regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law.[26] Where the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged,[27] and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency information available to the public without identifying his client.

EC 7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not privileged, and should comply with applicable laws and legislative rules.[28]

EC 7-17 The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no

obligation to adopt a personal viewpoint favorable to the interests or desires of his client.[29] While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC 7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person.[30] If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself,[31] except that he may advise him to obtain a lawyer.

Duty of the Lawyer to the Adversary System of Justice

EC 7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known;[32] the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgements.[33] The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.[34]

EC 7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently[35] according to procedures that command public confidence and respect.[36] Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process. The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the bases for standards of professional conduct set forth in the Disciplinary Rules.

EC 7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process;[37] further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

EC 7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.[38]

EC 7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client.[39] Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.[40]

EC 7-24 In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact.[41] It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

EC 7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them.[42] As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

EC 7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence.[43] A lawyer who knowingly[44] participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.[45]

EC 7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.[46]

EC 7-28 Witnesses should always testify truthfully[47] and should be free from any financial inducements that might tempt them to do otherwise.[48] A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.[49]

EC 7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences.[50] When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communiation by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror[51] or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected.[52] When an extrajudicial communi-

cation by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

EC 7-30 Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

EC 7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC 7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

EC 7-33 A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury.[53] Such news or comments may prevent prospective jurors from being impartial at the outset of the trial[54] and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial.[55] The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal.[56] For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

EC 7-34 The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer,[57] therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.[58]

EC 7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.[59] For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings.[60] While maintaining his independence, a lawyer should be respectful, courteous, and aboveboard in his relations with a judge or hearing officer before whom he appears.[61] He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-37 In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers.[62] A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC 7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client.[63] He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so.[64] A lawyer should be punctual in fulfilling all professional commitments.[65]

EC 7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

DISCIPLINARY RULES

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:[66]

(1) Fail to seek the lawful objectives of his client through reasonably available means[67] permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship,[68] except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.[69]

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.[70]

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same.[71]
(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.[72]

DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.[73]

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104 Communicating With One of Adverse Interest.[74]

(A) During the course of his representation of a client a lawyer shall not:
(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party[75] or is authorized by law to do so.
(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel,[76] if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.[77]

DR 7-105 Threatening Criminal Prosecution.

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

DR 7-106 Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:[78]
(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.[79]
(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.[80]

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.[81]
(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.[82]
(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused;[83] but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.[84]
(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
(7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7-107 Trial Publicity.[85]

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
(1) Information contained in a public record.
(2) That the investigation is in progress.
(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, making or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
(5) The identity, testimony, or credibility of a prospective witness.
(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:
(1) The name, age, residence, occupation, and family status of the accused.
(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
(3) A request for assistance in obtaining evidence.
(4) The identity of the victim of the crime.
(5) The fact, time, and place of arrest, resistance, pursuit and use of weapons.
(6) The identity of investigating and arresting officers or agencies and the length of the investigation.
(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
(8) The nature, substance, or text of the charge.
(9) Quotations from or references to public records or the court in the case.
(10) The scheduling or result of any step in the judicial proceedings.
(11) That the accused denies the charges made againt him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) [Omitted]*

(H) The following text is that of Canon 20 of the Canons of Professional Ethics:
Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.*

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from

replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

DR 7-108 Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.[86]

(2) A lawyer who is not connected therewith shall not communicate with a juror concerning the case.

(C) DR 7-108 (A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.[87]

(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

DR 7-109 Contact with Witnesses.

(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.[88]

(B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.[89]

(C) A lawyuer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case.[90] But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

DR 7-110 Contact with Officials.[91]

(A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

(B) In any adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.[91]

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*By order of February 14, 1975, the District of Columbia Court of Appeals deleted DR 7-107(G) and (H). In lieu of these provisions, the court retained Canon 20 of the Canons of Professional Ethics. As adopted by the American Bar Association, DR 7-107(G) and (H) provide:

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extra-judicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

NOTES

1. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." Powell v. Alabama, 287 U.S. 45, 68-69, 77 L. Ed. 158, 170, 53 S. Ct. 55, 64 (1932).

2. *Cf.* ABA Canon 4.

"At times... [the tax lawyer] will be wise to discard some arguments and he should exercise discretion to emphasize the arguments which in his judgment are most likely to be persuasive. But this process involves legal judgment rather than moral attitudes. The tax lawyer should put aside private disagreements with Congressional and Treasury policies. His own notions of policy, and his personal view of what the law should be, are irrelevant. The job entrusted to him by his client is to use all his learning and ability to protect his client's rights, not to help in the process of promoting a better tax system. The tax lawyer need not accept his client's economic and social opinions, but the client is paying for technical attention and undivided concentration upon his affairs. He is equally entitled to performance unfettered by his attorney's economic and social predilections." Paul, *The Lawyer as a Tax Adviser,* 25 Rocky Mt. L. Rev. 412, 418 (1953).

3. *See* ABA Canons 15 and 32.

ABA Canon 5, although only speaking of one accused of crime, imposes a similar obligation on the lawyer: "[T]he lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

"Any persuasion or pressure on the advocate which deters him from planning and carrying out the litigation on the basis of 'what, within the framework of the law, is best for my client's interest?' interferes with the obligation to represent the client fully within the law.

"This obligation, in its fullest sense, is the heart of the adversary process. Each attorney, as an advocate, acts for and seeks that which in his judgment is best for his client, within the bounds authoritatively established. The advocate does not *decide* what is just in this case—he would be usurping the function of the judge and jury—he acts for and seeks for his client that which he is entitled to under the law. He can do no less and properly represent the client." Thode, *The Ethical Standard for the Advocate,* 39 Texas L. Rev. 575, 584 (1961).

"The [Texas public opinion] survey indicates that distrust of the lawyer can be traced directly to certain factors. Foremost of these is a basic misunderstanding of the function of the lawyer as an advocate in an adversary system.

"Lawyers are accused of taking advantage of 'loopholes' and 'technicalties' to win. Persons who make this charge are unaware, or do not understand, that the lawyer is hired to win, and if he does not exercise every legitimate effort in his client's behalf, then he is betraying a sacred trust." Rochelle & Payne, *The Struggle for Public Understanding,* 25 Texas B.J. 109, 159 (1962).

"The importance of the attorney's individed allegiance and faithful service to one accused of crime, irrespective of the attorney's personal opinion as to the guilt of his client, lies in Canon 5 of the American Bar Association Canon of Ethics.

"The difficulty lies, of course, in ascertaining whether the attorney has been guilty of an error of judgment, such as an election with respect to trial tactics, or has otherwise been actuated by his conscience or belief that his client should be convicted in any event. All too frequently courts are called upon to review actions of defense counsel which are, at the most, errors of judgment, not properly reviewable on habeas corpus unless the trial is a farce and a mockery of justice which requires the court to intervene.... But when defense counsel, in a truly adverse proceeding, admits that his conscience would not permit him to adopt certain customary trial procedures, this extends beyond the realm of judgment and strongly suggests an invasion of constitutional rights." Johns v. Smyth, 176 F. Supp. 949, 952 (E.D. Va. 1959), *modified,* United States ex rel. Wilkins v. Banmiller, 205 F. Supp. 123, 128, n. 5 (E.D. Pa. 1962), *aff'd,* 325 F. 2d 514 (3d Cir. 1963), *cert. denied,* 379 U.S. 847, 13 L. Ed. 2d 51, 85 S. Ct. 87 (1964).

"The adversary system in law administration bears a striking resemblance to the competitive economic system. In each we assume that the individual through partisanship or through self-interest will strive mightily for his side, and that kind of striving we must have. But neither system would be tolerable without restraints and modifications, and at times without outright departures from the system itself. Since the legal profession is entrusted with the system of law administration, a part of its task is to develop in its members appropriate restraints without impairing the values of partisan striving. An accompanying task is to aid in the modification of the adversary system or departure from it in areas to which the system is unsuited." Cheatham, *The Lawyer's Role and Surroundings,* 25 Rocky Mt. L. Rev. 405, 410 (1953).

4. "Rule 4.15 prohibits, in the pursuit of a client's cause, 'any manner of fraud or chicane'; Rule 4.22 requires 'candor and fairness' in the conduct of the lawyer, and forbids the making of knowing misquotations; Rule 4.47 provides that a lawyer 'should always maintain his integrity,' and generally forbids all misconduct injurious to the interests of the public, the courts, or his clients, and acts contrary to 'justice honesty, modesty or good morals.' Our Commissioner has accurately paraphrased these rules as follows: 'An attorney does not have the duty to do all and whatever he can that may enable him to win his client's cause or to further his client's interest. His duty and efforts in these respects, although they should be prompted by his "entire devotion" to the interest of his client, must be within and not without the bounds of the law.'" In re Wines, 370 S.W.2d 328, 333 (Mo. 1963).

See Note, 38 Texas L. Rev. 107, 110 (1959).

5. "Under our system of government the process of adjudication is surrounded by safeguards evolved from centuries of experience. These safeguards are not designed merely to lend formality and decorum to the trial of causes. They are predicated on the assumption that to secure for any controversy a truly informed and dispassionate decision is a difficult thing, requiring for its achievement a special summoning and organization of human effort and the adoption of measures to exclude the biases and prejudgments that have free play outside the courtroom. All of this goes for naught if the man with an unpopular cause is unable to find a competent lawyer courageous enough to represent him. His chance to have his day in court loses much of its meaning if his case is handicapped from the outset by the very kind of prejudgment our rules of evidence and procedure are intended to prevent." *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1216 (1958).

6. "[I]t is... [the tax lawyer's] positive duty to show the client how to avail himself to the full of what the law permits. He is not the keeper of the Congressional conscience." Paul, *The Lawyer as a Tax Adviser,* 25 Rocky Mt. L. Rev. 412, 418 (1953).

7. *See* ABA Canons 15 and 30.

8. "The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.... It is a matter of proximity and degree as to which minds will differ...." Justice Holmes, in Superior Oil Co. v. Mississippi, 280 U.S. 390, 395-96, 74 L. Ed 504, 508, 50 S. Ct. 169, 170 (1930).

9. "Today's lawyers perform two distinct types of functions, and our ethical standards should, but in the main do not, recognize these two functions. Judge Philbrick McCoy recently reported to the American Bar Association the need for a reappraisal of the Canons in light of the new and distinct function of counselor, as distinguished from advocate, which today predominates in the legal profession....

"...In the first place, any revision of the canons must take into account and speak to this new and now predominant function of the lawyer.... It is beyond the scope of this paper to discuss the ethical standards to be applied to the counselor except to state that in my opinion such standards should require a greater recognition and protection for the interest of the public generally than is presently expressed in the canons. Also, the counselor's obligation should extend to requiring him to inform and to impress upon the client a just solution of the problem, considering all interests involved." Thode, *The Ethical Standard for the Advocate,* 39 Texas L. Rev. 575, 578-79 (1961).

"The man who has been called into court to answer for his own actions is entitled to fair hearing. Partisan advocacy plays its essential part in such a hearing, and the lawyer pleading his client's case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counselor. The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal advisor in a line of conduct that is immoral, unfair, or of doubtful legality. In saving himself from this unworthy involvement, the lawyer cannot be guided solely by an unreflective inner sense of good faith; he must be at pains to preserve a sufficient detachment from his client's interests so that he remains capable of sound and objective appraisal of the propriety of what his client proposes to do." *Professional Responsibility: Report of the Joint conference,* 44 A.B.A.J. 1159, 1161 (1958).

10. "[A] lawyer who is asked to advise his client... may freely urge the statement of positions most favorable to the client just as long as there is reasonable basis for those positions." *ABA Opinion* 314 (1965).

11. "The lawyer... is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness.... His personal belief in the soundness of his cause or of the authorities supporting it, is irrelevant." *ABA Opinion* 280 (1949).

"Counsel apparently misconceived his role. It was his duty to honorably present his client's contentions in the light most favorable to his client. Instead he presumed to advise the court as to the validity and sufficiency of prisoner's motion, by letter. We therefore conclude that prisoner had no effective assistance of counsel and remand this case to the District Court with instructions to set aside the Judgment, appoint new counsel to represent the prisoner if he makes no objection thereto, and proceed anew." McCartney v. United States, 343 F. 2d 471, 472 (9th Cir. 1965).

12. "Here the court-appointed counsel had the transcript but refused to proceed with the appeal because he found no merit in it.... We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as *amicus curiae* which was condemned in *Ellis, supra*. Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity....

"The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." Anders v. California, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 498, 87 S. Ct. 1396, 1399-1400 (1967), *rehearing denied*, 388 U.S. 924, 18 L. Ed. 2d 1377, 87 S. Ct. 2094 (1967).

See Paul, *The Lawyer As a Tax Adviser*, 25 Rocky Mt. L. Rev. 412, 432 (1953).

13. *See* ABA Canon 32.

14. "For a lawyer to represent a syndicate notoriously engaged in the violation of the law for the purpose of advising the members how to break the law and at the same time escape it, is manifestly improper. While a lawyer may see to it that anyone accused of crime, no matter how serious and flagrant, has a fair trial, and present all available defenses, he may not co-operate in planning violations of the law. There is a sharp distinction, of course, between advising what can lawfully be done and advising how unlawful acts can be done in a way to avoid conviction. Where a lawyer accepts a retainer from an organization, known to be unlawful, and agrees in advance to defend its members when from time to time they are accused of crime arising out of its unlawful activities, this is equally improper."

"See also *Opinion* 155." *ABA Opinion* 281 (1952).

15. *See* ABA Special Committee on Minimum Standards frorthe Administration of Criminal Justice, *Standards Relating to Pleas of Guilty* pp. 69-70 (1968).

16. "First of all, a truly great lawyer is a wise counselor to all manner of men in the varied crises of their lives when they most need disinterested advice. Effective counseling necessarily involves a thoroughgoing knowledge of the principles of the law not merely as they appear in the books but as they actually operate in action." Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A.J. 31 (1954).

17. "A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon...." ABA Canon 8.

18. "[I]n devising charters of collabortive effort the lawyer often acts where all of the affected parties are present as participants. But the lawyer also performs a similar function in situations where this is not so as, for example, in planning estates and drafting wills. Here the instrument defining the terms of collaboration may affect persons not present and often not born. Yet here, too, the good lawyer does not serve merely as a legal conduit for his client's desires, but as a wise counselor, experienced in the art of devising arrangements that will put in workable order the entangled affairs and interests of human beings." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1162 (1958).

19. *See* ABA Canon 8.

"Vital as is the lawyer's role in adjudication, it should not be thought that it is only as an advocate pleading in open court that he contributes to the administration of the law. The most effective realization of the law's aims often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, where the lawyer's quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161 (1958).

20. "My summation of Judge Sharswood's view of the advocate's duty to the client is that he owes to the client the duty to use all legal means in support of the client's case. However, at the same time Judge Sharswood recognized that many advocates would find this obligation unbearable if applicable without exception. Therefore, the individual lawyer is given the choice of representing his client fully within the bounds set by the law *or of telling his client that he cannot do so*, so that the client may obtain another attorney if he wishes." Thode, *The Ethical Standard for the Advocate*, 39 Texas L. Rev. 575, 582 (1961).

Cf. Code of Professional Responsibility, DR 2-110(C).

21. *See* ABA Canon 24.

22. Thode, *The Ethical Standard for the Advocate*, 39 Texas L. Rev. 575, 592 (1961).

23. *Cf. ABA Opinions* 253 (1943) and 178 (1938).

24. *See* ABA Canon 5 and Berger v. United States. 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629 (1935).

"The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to a partisan advocate must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958).

"The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict but to see that justice is done." *ABA Opinion* 150 (1936).

25. As to appearances before a department of government, Canon 26 provides: "A lawyer openly...may render professional services...in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts...."

26. "But as an advocate before a service which itself represents the adversary point of view, where his client's case is fairly arguable, a lawyer is under no duty to disclose its weaknesses, any more than he would be to make such a disclosure to a brother lawyer. The limitations within which he must operate are best expressed in Canon 22...." *ABA Opinion* 314 (1965).

27. See Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

28. *See* ABA Canon 26.

29. "Law should be so practiced that the lawyer remains free to make up his own mind how he will vote, what causes he will support, what economic and political philosophy he will espouse. It is one of the glories of the profession that it admits of this freedom. Distinguished examples can be cited of lawyers whose views were at variance from those of their cients, lawyers whose skill and wisdom make them valued advisers to those who had little sympathy with their views as citizens." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1217 (1958).

"No doubt some tax lawyers feel constrained to abstain from activities on behalf of a better tax system because they think that their clients may object. Clients have no right to object if the tax adviser handles their affairs competently and faithfully and independently of his private views as to tax policy. They buy his expert services, not his private opinions or his

silence on issues that gravely affect the public interest." Paul, *The Lawyer as a Tax Adviser,* 25 Rocky Mt. L. Rev. 412, 434 (1953).

30. *See* ABA Canon 9.

31. *Id.*

32. *See Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1160 (1958).

33. "Without the participation of someone who can act responsibly for each of the parties, this essential narrowing of the issues [by exchange of written pleadings or stipulations of counsel] becomes impossible. But here again the true significance of partisan advocacy lies deeper, touching once more the integrity of the adjudicative process itself. It is only through the advocate's participation that the hearing may remain in fact what it purports to be in theory: a public trial of the facts and issues. Each advocate comes to the hearing prepared to present his proofs and arguments, knowing at the same time that his arguments may fail to persuade and that his proof may be rejected as inadequate....The deciding tribunal, on the other hand, comes to the hearing uncommitted. It has not represented to the public that any fact can be proved, that any argument is sound, or that any particular way of stating a litigant's case is the most effective expression of its merits." *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1160-61 (1958).

34. *Cf.* ABA Canons 15 and 32.

35. *Cf.* ABA Canon 21.

36. See *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1216 (1958).

37. "We are of the opinion that the letter in question was improper, and that in writing and sending it respondent was guilty of unprofessional conduct. This court has heretofore expressed its disapproval of using threats of criminal prosecution as a means of forcing settlement of civil claims. ...

"Respondent has been guilty of a violation of a principle which condemns any confusion of threats of criminal prosecution with the enforcement of civil claims. For this misconduct he should be severely censured." Matter of Gelman, 230 App. Div. 524, 527, N.Y.S. 416, 419 (1930).

38. "An attorney has the duty to protect the interests of his client. He has a right to press legitimate argument and to protest an erroneous ruling." Gallagher v. Municipal Court, 31 Cal. 2d 784, 796, 192 P.2d 905, 913 (1948).

"There must be protection, however, in the far more frequent case of the attorney who stands on his rights and combats the order in good faith and without disrespect believing with good cause that it is void, for it is here that the independence of the bar becomes valuable." Note, 39 Colum. L. Rev. 433, 438 (1939).

39. "Too many do not understand that accomplishment of the layman's abstract ideas of justice is the function of the judge and jury, and that it is the lawyer's sworn duty to portray his client's case in its most favorable light." Rochelle and Payne, *The Struggle for Public Understanding,* 25 Texas B.J. 109, 159 (1962).

40. "We are of the opinion that this Canon requires the lawyer to disclose such decisions [that are adverse to his client's contentions] to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case." *ABA OPinion* 146 (1935).

Cf. ABA Opinion 280 (1949) and Thode, *The Ethical Standard for the Advocate,* 39 Texas L. Rev. 575, 585-86 (1961).

41. *See* ABA Canon 15.

"The traditional duty of an advocate is that he honorably uphold the contentions of his client. He should not voluntarily undermine them." Harders v. State of California, 373 F.2d 839, 842 (9th Cir. 1967).

42. *See* ABA Canon 22.

43. *Id.; cf.* ABA Canon 41.

44. *See generally ABA Opinion* 287 (1953) as to a lawyer's duty when he unknowingly participates in introducing perjured testimony.

45. "Under any standard of proper ethical conduct an attorney should not sit by silently and permit his client to commit what may have been perjury, and which certainly would mislead the court and the opposing party on a matter vital to the issue under consideration....

....

"Respondent next urges that it was his duty to observe the utmost good faith toward his client, and therefore he could not divulge any confidential information. This duty to the client of course does not extend to the point of authorizing collaboration with him in the commission of fraud." In re Carroll, 244 S.W.2d 474, 474-75 (Ky. 1951).

46. *See* ABA Canon 5; *cf. ABA Opinion* 131 (1935).

47. *Cf.* ABA Canon 39.

48. "The prevalence of perjury is a serious menace to the administration of justice, to prevent which no means have as yet been satisfactorily devised. But there certainly can be no greater incentive to perjury than to allow a party to make payments to make payments to its opponents witnesses under any guise or on any excuse, and at least attorneys who are officers of the court to aid it in the administration of justice, must keep themselves clear of any connection which in the slightest degree tends to induce witnesses to testify in favor of their clients." In re Robinson, 151 App. div. 589, 600, 136 N.Y.S. 548, 556-57 (1912), *aff'd,* 209 N.Y. 354, 103 N.E. 160 (1913).

49. "It will not do for an attorney who seeks to justify himself against charges of this kind to show that he has escaped criminal responsibility under the Penal Law, nor can he blindly shut his eyes to a system which tends to suborn witnesses, to produce perjured testimony, and to suppress the truth. He has an active affirmative duty to protect the administration of justice from perjury and fraud, and that duty is not performed by allowing his subordinates and assistants to attempt to subvert justice and procure results for his clients based upon false testimony and perjured witnesses." *Id.,* 151 App. Div. at 592, 136 N.Y.S. at 551.

50. *See* ABA Canon 23.

51. "[I]t is unfair to jurors to permit a disappointed litigant to pick over their private associations in search of something to discredit them and their verdict. And it would be unfair to the public too if jurors should understand that they cannot convict a man of means with out risking an inquiry of that kind by paid investigators, with, to boot, the distortions an inquiry of that kind can produce." State v. LaFera, 42 N.J. 97, 107, 199 A.2d 630, 636 (1964).

52. *ABA Opinion* 319 (1968) points out that "[m]any courts today, and the trend is in this direction, allow the testimony of jurors as to all irregularities in and out of the courtroom except those irregularities whose existence can be determined only be exploring the consciousness of a single particular juror, New Jersey v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955). Model Code of Evidence Rule 301. Certainly as to states in which the testimony and affidavits of jurors may be received in support of or against a motion for new trial, a lawyer, in his obligation to protect his client, must have the tools for ascertaining whether or not grounds for a new trial exist and it is not unethical for him to talk to and question jurors."

53. *Generally see* ABA Advisory Committee on Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press (1966).

"[T]he trial court might well have proscribed extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters.... See State v. Van Dwyne, 43 N.Y. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. In addition, reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings.... In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extrajudicial statements. Sheppard v. Maxwell, 384 U.S. 333, 361-62, 16 L. Ed. 2d 600, 619-20, 86 S. Ct. 1507, 1521-22 (1966).

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. As a result, at this time those safeguards do not permit the televising and photographing of a criminal trial, save in two States and there only under restrictions. The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." Estes v. State of Texas, 381 U.S. 532, 540, 14 L. Ed. 2d 543, 549, 85 S. Ct. 1628, 1631-32 (1965), *rehearsing denied,* 382 U.S. 875, 15 L. Ed. 2d 118, 86 S. Ct. 18 (1965).

54. "Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence.... The trial witnesses present at the hearing, as well as the original jury panel, were undoubtedly made aware of the peculiar public importance of the case by the press and television coverage being provided, and by the fact that they

themselves were televised live and their pictures rebroadcast on the evening show." *Id.*, 381 U.S. at 536-37, 14 L. Ed. 2d at 546-47, 85 S. Ct. at 1629-30.

55. "The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in Patterson v. Colorado, 205 U.S. 454, 462 (1907):

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Sheppard v. Maxwell, 384 U.S. 333, 351, 16 L. Ed. 2d 600, 614, 86 S. Ct. 1507, 1516 (1966).

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial.... Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news acounts as when it is a part of the prosecution's evidence.... It may indeed be greater for it is then not tempered by protective procedures." Marshall v. United States, 360 U.S. 310, 312-13, 3 L. Ed. 2d 1250, 1252, 79 S. Ct. 1171, 1173 (1959).

"The experienced trial lawyer knows that an adverse public opinion is a tremendous disadvantage to the defense of his client. Although grand jurors conduct their deliberations in secret, they are selected from the body of the public. They are likely to know what the general public knows and to reflect the public attitude. Trials are open to the public, and aroused public opinion respecting the merits of a legal controversy creates a court room atmosphere which, without any vocal expression in the presence of the petit jury, makes itself felt and has its effect upon the action of the petit jury. Our fundamental concepts of justice and our American sense of fair play require that the petit jury shall be composed of persons with fair and impartial minds and without preconceived views as to the merits of the controversy, and that it shall determine the issues presented to it solely upon the evidence adduced at the trial and according to the law given in the instructions of the trial judge.

"While we may doubt that the of public opinion would sway or bias the judgment of the trial judge in an equity proceeding, the defendant should not be called upon to run that risk and the trial court should not have his work made more difficult by any dissemination of statements to the public that would be calculated to create a public demand for a particular judgment in a prospective or pending case." *ABA Opinion* 199 (1940).

Cf. Estes v. State of Texas, 381 U.S. 532, 544-45, 144 L. Ed. 2d 543, 551, 85 S. Ct. 1628, 1634 (1965), *rehearing denied*, 381 U.S. 875, 15 L. Ed. 2d 118, 86 S. Ct. 18 (1965).

56. *See* ABA Canon 20.

57. Canon 3 observes that a lawyer "deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor."

See ABA Canon 32.

58. "*Judicial Canon 32* provides:

> A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

The language of this Canon is perhaps broad enough to prohibit campaign contributions by lawyers, practicing before the court upon which the candidate hopes to sit. However, we do not think it was intended to prohibit such contributions when the candidate is obligated, by force of circumstances over which he has no control, to conduct a campaign, the expense of which exceeds that which he should reasonably be expected to personally bear!" *ABA Opinion* 226 (1941).

59. *See* ABA Canons 3 and 32.

60. *Cf.* ABA Canon 18.

61. *See* ABA Canons 1 and 3.

62. *See* ABA Canon 17.

63. *See* ABA Canon 24.

64. *See* ABA Canon 25.

65. *See* ABA Canon 21.

66. *See* ABA Canon 15.

67. *See* ABA Canons 5 and 15; *cf.* ABA Canons 4 and 32.

68. *Cf.* ABA Canon 24.

69. *See* ABA Canon 30.

70. *Cf.* ABA Canons 22 and 29.

Footnote 71 has been deleted because of amendments to Canon 7.

72. *See* Precision Inst. Mfg. Co. v. Automotive M.M. Co., 324 U.S. 806, 89 L. Ed 1381, 65 S. Ct. 993 (1945).

73. *Cf.* ABA Canon 5.

74. "*Rule 12*.... A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body." Cal. Business and Professions Code § 6076 (West 1962).

75. *See* ABA Canon 9; *cf. ABA Opinions* 124 (1934), 108 (1934), 95 (1933), and 75 (1932); *also see* In re Schwabe, 242 Or. 169, 174-75, 408 P.2d 922, 924 (1965).

"It is clear from the earlier opinions of this committee that *Canon 9* is to be construed literally and does not allow a communication with an opposing party, without the consent of his counsel, though the purpose merely be to investigate the facts. *Opinions 117, 55, 66,*" *ABA Opinion* 187 (1938).

76. *Cf. ABA Opinion* 102 (1933).

77. *Cf.* ABA Canon 9 and *ABA Opinion* 58 (1931).

78. *Cf.* Note, 38 Texas L. Rev. 107, 108-09 (1959).

79. "In the brief summary in the 1947 edition of the Committee's decisions (p. 17), *Opinion 146* was thus summarized: *Opinion 146*—A lawyer should disclose to the court a decision directly adverse to his client's case that is unknown to his adversary.

....

"We would not confine the Opinion to 'controlling authorities'—i.e., those decisive of the pending case—but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

....

"... The test in every case should be: Is the decision which opposing counsel has overlooked on which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?" *ABA Opinion* 280 (1949).

80. "The authorities are substantially uniform against any privilege as applied to the fact of retainer or identity of the client. The privilege is limited to confidential communications, and a retainer is not a confidential communication, although it cannot come into existence without some communication between the attorney and the—at that stage prospective—client." United States v. Pape 144 F.2d 778, 782 (2d Cir. 1944), *cert. denied*, 323 U.S. 752, 89 L. Ed. 2d 602, 65 S. Ct. 86 (1944).

"To be sure, there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication, as where the substance of a disclosure has already been revealed but not its source." Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962).

81. *See* ABA Canon 22; *cf.* ABA Canon 17.

"The rule allowing counsel when addressing the jury the widest latitude in discussing the evidence and presenting the client's theories falls far short of authorizing the statement by counsel of matter not in evidence, or indulging in argument founded on no proof, or demanding verdicts for purposes other than the just settlement of the matters at issue between the litigants, or appealing to prejudice or passion. The rule confining counsel to legitimate argument is not based on etiquette, but on justice. Its violation is not merely an overstepping of the bounds of propriety, but a violation of a party's rights. The jurors must determine the issues upon the evidence. Counsel's address should help them do this, not tend to lead them astray." Cherry Creek Nat. Bank v. Fidelity & Cas. Co., 207 App. Div. 787, 790-91, 202 N.Y.S. 611, 614 (1924).

82. *Cf.* ABA Canon 18.

§ 6068.... It is the duty of an attorney:

....

"(f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged." Cal. Business and Professions Code § 6068 (West 1962).

83. "The record in the case at bar was silent concerning the qualities and character of the deceased. It is especially improper, in addressing the jury in a murder case, for the prosecuting attorney to make reference to his knowledge of the good qualities of the deceased where there is no evidence in the record bearing upon his character.... A prosecutor should never inject into his argument evidence not introduced at the trial." People v. Dukes, 12 Ill. 2d 334, 341, 146 N.E.2d 14, 17-18 (1957).

84. "A lawyer should not ignore known customs or practice of the Bar

or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel." ABA Canon 25.

85. The provisions of Section (A), (B), (C), and (D) of this Disciplinary Rule incorporate the fair trial-free press standards which apply to lawyers as adopted by the ABA House of Delegates, Feb. 19, 1968, upon the recommendation of the Fair Trial and Free Press Advisory Committee of the ABA Special Committee on Minimum Standards for the Administration of Criminal Justice.

Cf. ABA Canon 20; *see generally* ABA Advisory Committee on Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press (1966).

"From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that prescribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.... The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." Sheppard v. Maxwell, 384 U.S. 333, 362-63, 16 L. Ed.2d 600, 620, 86 S. Ct. 1507, 1522 (1966).

86. *See* ABA Canon 23.

87. "[I]t would be unethical for a lawyer to harass, entice, induce or exert influence on a juror to obtain his testimony." *ABA Opinion* 319 (1968).

88. *See* ABA Canon 5.

89. *Cf.* ABA Canon 5.

"*Rule 15*.... A member of the State Bar shall not advise a person, whose testimony could establish or tend to establish a material fact, to avoid service of process, or secrete himself, or otherwise to make his testimony unavailable." Cal. Business and Professions Code § 6076 (West 1962).

90. *See* In re O'Keefe, 49 Mont. 369, 142 P. 638 (1914).

91. *Cf.* ABA Canon 3.

92. "*Rule 16*.... A member of the State Bar shall not, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer except in open court upon the merits of a contested matter pending before such judge or judicial officer; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. This rule shall not apply to ex parte matters." Cal. Business and Professional Code § 6076 (West 1962).

CANON 8
A Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

EC 8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system.[1] This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system[2] without regard to the general interests or desires of clients or former clients.[3]

EC 8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate change in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded.[4] Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-3 The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC 8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public.[5] A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

EC 8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified.[6] It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected[7] or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism.[8] While a lawyer as a citizen has a right to criticize such officials publicly,[9] he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.[10] Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC 8-7 Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in

establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC 8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.[11]

EC 8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage and should aid in making, needed changes and improvements.

DISCIPLINARY RULES

DR 8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor or himself or of a client.

(3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.[12]

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

DR 8-103 Lawyer Candidate for Judicial Office.

(A) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Canon 7 of the Code of Judicial Conduct.

NOTES

1. "...[Another] task of the great lawyer is to do his part individually and as a member of the organized bar to improve his profession, the courts, and the law. As President Theodore Roosevelt aptly put it, 'Every man owes some of his time to the upbuilding of the profession to which he belongs.' Indeed, this obligation is one of the great things which distinguishes a profession from a business. The soundness and the necessity of President Roosevelt's admonition insofar as it relates to the legal profession cannot be doubted. The advances in natural science and technology are so startling and the velocity of change in business and in social life is so great that the law along with the other social sciences, and even human life itself, is in grave danger of being extinguished by new gods of its own invention if it does not awake from its lethargy. Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A.J. 31, 31-32 (1954).

2. *See* ABA Canon 29; *Cf.* Cheatham, *The Lawyer's Role and Surroundings*, 25 Rocky Mt. L. Rev. 405, 406-07 (1953).

"The lawyer tempted by repose should recall the heavy costs paid by his profession when needed legal reform has to be accomplished through the initiative of public-spirited laymen. Where change must be thrust from without upon an unwilling Bar, the public's least flattering picture of the lawyer seems confirmed. The lawyer concerned for the standing of his profession will, therefore, interest himself actively in the improvement of the law. In doing so he will not only help to maintain confidence in the Bar, but will have the satisfaction of meeting a responsibility inhering in the nature of his calling." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1217 (1958).

3. *See* Stayton, *Cum Honore Officium*, 19 Tex. B.J. 765, 766 (1956); *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1162 (1958); and Paul, *The Lawyer as a Tax Adviser*, 25 Rocky Mt. L. Rev. 412, 433-34 (1953).

4. "There are few great figures in the history of the Bar who have not concerned themselves with the reform and improvement of the law. The special obligation of the profession with respect to legal reform rests on considerations too obvious to require enumeration. Certainly it is the lawyer who has both the best chance to know when the law is working badly and the special competence to put it in order." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1217 (1958).

5. "*Rule 14*....A member of the State Bar shall not communicate with, or appear before, a public officer, board, committee or body, in his professional capacity, without first disclosing that he is an attorney representing interests that may be affected by action of such officer, board, committee or body." Cal. Business and Professions Code § 6056 (West 1962).

6. *See* ABA Canon 2.

"Lawyers are better able than laymen to appraise accurately the qualifications of candidates for judicial office. It is proper that they should make that appraisal known to the voters in a proper and dignified manner. A lawyer may with propriety endorse a candidate for judicial office and seek like endorsement from other lawyers. But the lawyer who endorses a judicial candidate or seeks that endorsement from other lawyers should be actuated by a sincere belief in the superior qualifications of the candidate for judicial service and not by personal or selfish motives; and a lawyer should not use or attempt to use the power or prestige of the judicial office to secure such endorsement. On the other hand, the lawyer whose endorsement is sought, if he believes the candidate lacks the essential qualifications for the office or believes the opposing candidate is better qualified, should have the courage and moral stamina to refuse the request for endorsement." *ABA Opinion* 189 (1938).

7. "[W]e are of the opinion that, whenever a candidate for judicial office merits the endorsement and support of lawyers, the lawyers may make financial contributions toward the campaign if its cost, when reasonably conducted, exceeds that which the candidate would be expected to bear personally." *ABA Opinion* 226 (1941).

8. *See* ABA Canon 1.

9. "Citizens have a right under our constitutional system to criticize governmental officials and agencies. Courts are not, and should not be, immune to such criticism." Konigsberg v. State Bar of California, 353 U.S. 252, 269 (1957).

10. "[E]very lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our governmental structure, and will refrain from unjustified attack on the character of the judges, while recognizing the duty to denounce and expose a corrupt or dishonest judge." Kentucky State Bar Ass'n v. Lewis, 282 S.W. 2d 321, 326 (Ky. 1955).

"We should be the last to deny that Mr. Meeker has the right to uphold the honor of the profession and to expose without fear or favor corrupt or

dishonest conduct in the profession, whether the conduct be that of a judge or not.... However, this Canon [29] does not permit one to make charges which are false and untrue and unfounded in fact. When one's fancy leads him to make false charge, attacking the character and integrity of others, he does so at his peril. He should not do so without adequate proof of his charges and he is certainly not authorized to make careless, untruthful and vile charges against his professional brethren." In re Meeker, 76 N.M. 354, 364-65, 414 F.2d 862 (1966), *appeal dismissed,* 385 U.S. 449, 17 L. Ed. 2d 510, 87 S. Ct. 613 (1967).

11. "*Opinions 16, 30, 34, 77, 118* and *134* relate to *Canon 6,* and pass on questions concerning the propriety of the conduct of an attorney who is a public officer, in representing private interests adverse to those of the public body which he represents. The principle applied in those opinions is that an attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." *ABA Opinion* 192 (1939).

"The next question is whether a lawyer-member of a legislative body may appear as counsel or co-counsel at hearings before a zoning board of appeals, or similar tribunal, created by the legislative group of which he is a member. We are of the opinion that he may practice before fact-finding officers, hearing bodies and commissioners, since under our views he may appear as counsel in the courts where his municipality is a party. Decisions made at such hearings are usually subject to administrative review by the courts upon the record there made. It would be inconsistent to say that a lawyer-member of a legislative body could not participate in a hearing at which the record is made, but could appear thereafter when the cause is heard by the courts on administrative review. This is subject to an important exception. He should not appear as counsel where the matter is subject to review by the legislative body of which he is a member.... We are of the opinion that where a lawyer does so appear there would be conflict of interests between his duty as an advocate for his client on the one hand and the obligation to his governmental unit on the other." In re Becker, 16 Ill. 2d 488, 494-95, 158 N. E. 2d 753, 756-57 (1959).

Cf. ABA Opinions 186 (1938), 136 (1935), 118 (1934), and 77 (1932).

12. *Cf.* ABA Canons 1 and 2.

CANON 9
A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system.[1] A lawyer should promote public confidence in our system and in the legal profession.[2]

EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.[3]

EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.[4]

EC 9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC 9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.[5]

EC 9-7 A lawyer has an obligation to the public to participate in collective efforts of the bar to reimburse persons who have lost money or property as a result of the misappropriation or defalcation of another lawyer, and contribution to a client's security fund is an acceptable method of meeting this obligation.*

***EC 9-7 was added by the American Bar Association in February 1980. Pursuant to Rule X, the amendment is incorporated in the standards governing the practice of law in the District of Columbia.**

DR 9-101 Avoiding Impropriety of the Appearance of Impropriety.*

(A) A lawyer shall not state or imply that he or she is able to influence improperly, or upon grounds irrelevant to a proper determination on the merits, any tribunal, legislative body or legislator, or public official.

(B) A lawyer shall not at any time accept private employment in connection with any matter in which he or she participated personally and substantially as a public officer or employee, which includes acting on the merits of a matter in a judicial capacity.

DR 9-102 Imputed Disqualification of Partners, Associates, and Of Counsel Lawyers.

(A) If a lawyer is required to decline or to withdraw from employment under DR 9-101(B), on account of personal and substantial participation in a matter other than as a law clerk, no partner or associate of that lawyer, or lawyer with an of counsel relationship to that lawyer, may accept or continue such employment except as provided in (B) and (C) below.

(B) The prohibition stated in DR 9-102(A) shall not apply if the personally disqualified lawyer is screened from any form of participation in the matter of representation as the case may be, and from sharing in any fees resulting therefrom.

(C) When any of counsel lawyer, partner or associate of a lawyer personally disqualified under DR 9-101(B) accepts employment in connection with the matter giving rise to the personal disqualification, or when the fact and subject matter of such employment are otherwise disclosed on the public record, whichever occurs later, the following notifications shall be required: (1) The personally disqualified lawyer shall file with the public department or agency and serve on each other party to any pertinent proceeding a signed document attesting that during the period of his or her disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation, will not discuss the matter or the representation with any partner, associate, or of counsel lawyer, and will not share in any fees for the matter or the representation. (2) At least one affiliated lawyer shall file with the same department or agency and serve on the same parties a signed document attesting that all affiliated lawyers are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being taken to screen the personally disqualified lawyer.

(D) Signed documents filed pursuant to DR 9-102(C) shall be public except to the extent that a lawyer submitting a signed document shows that disclosure is inconsistent with Canon 4 or provisions of law.

(E) When the fact and subject matter of a client's employment of any of counsel lawyer, partner or associate of a lawyer personally disqualified under DR 9-101(B) has been otherwise disclosed to the public department or agency but not to the general public, the signed documents required by DR 9-102(C) shall be filed only with the public department or agency to which such disclosure has been made and shall not be served on any other person. So long as disclosure has not been otherwise made on the public record, the public department or agency shall keep the signed documents confidential.

DR 9-103 Preserving Identity of Funds and Property of a Client.[14]

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
  (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
  (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:
  (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
  (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safe-keeping as soon as practicable.
  (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
  (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(C) Nothing in DR 9-103(A) shall prohibit a lawyer or law firm from placing clients' funds which are nominal in amount or to be held for a short period of time in one or more interest-bearing accounts for the benefit of the charitable purposes of a court-approved IOLTA program. Appendix B of this rule [Rule X of the District of Columbia Court of Appeals Rules Governing the Bar] sets forth the provisions of the IOLTA program approved by the court.**

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*By order of April 30, 1982, the District of Columbia Court of Appeals made extensive modifications to the Disciplinary Rules under Canon 9. These include promulgating versions of DR 9-101 and DR 9-102. The prior version of DR 9-102 was renumbered as DR 9-103. The history of these amendments is set forth in the Court's order. DR 9-101 and DR 9-102 supplant DR 9-101 as it appears in the American Bar Association version of the Code of Professional Responsibility. The ABA version of DR 9-101 reads as follows:

DR 9-101 Avoiding Even the Appearance of Impropriety.[6]

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.[7]

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.[8]

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body,[9] or public official.

**By Order of February 22, 1985, the D.C. Court of Appeals added DR 9-103(C) to the Code of Professional Responsibility.

NOTES

1. "Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity." Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 499, 141 A. 866, 868 (1928).

2. "A lawyer should never be reluctant or too proud to answer unjustified criticism of his profession, of himself, or of his brother lawyer. He should guard the reputation of his profession and of his brothers as zealously as he guards his own." Rochelle and Payne, *The Struggle for Public Understanding*, 25 Texas B.J. 109, 162 (1962).

3. *See* ABA Canon 29.

4. *See* ABA Canon 36.

5. "As said in Opinion 49, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 134; 'An attorney should not only avoid impropriety but should avoid the appearance of impropriety.'" State ex rel. Nebraska State Bar Ass'n v. Richards, 165 Neb. 80, 93, 84 N.W.2d 136, 145 (1957).

"It would also be preferable that such contribution [to the campaign of a candidate for judicial office] be made to a campaign committee rather than to the candidate personally. In so doing, possible appearances of impropriety would be reduced to a minimum." *ABA Opinion* 226 (1941).

"The lawyer assumes high duties, and has imposed upon him grave responsibilities. He may be the means of much good or much mischief. Interests of vast magnitude are entrusted to him; confidence is reposed in him; life, liberty, character and property should be protected by him. He should guard, with jealous watchfulness, his own reputation, as well as that of his profession." People ex rel. Cutler v. Ford, 54 Ill. 520, 522 (1870), and also quoted in State Board of Law Examiners v. Sheldon, 43 Wyo. 522, 526, 7 P.2d 226, 227 (1932).

See ABA Opinion 150 (1936).

Footnotes 6-9. Deleted because of amendments in Canon 9.

10. *See* ABA Canon 11.

"*Rule 9*. . . . A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client. Unless the client otherwise directs in writing, he shall promptly deposit his client's funds in a bank or trust company. . . in a bank account separate from his own account and clearly designated as 'Clients' Funds Account' or 'Trust Funds Account' or words of similar import. Unless the client otherwise directs in writing, securities of a client in bearer form shall be kept by the attorney in a safe deposit box shall be clearly designated as 'Clients' Account' or 'Trust Account' or words of similar import, and be bank or trust company, . . . which safe deposit box Cal. Business and Professions Code § 6076 (West 1962).

"[C]ommingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors. . . . The rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money." Black v. State Bar, 57 Cal. 2d 219, 225-26, 368 P.2d 118, 122, 18 Cal. Rptr. 518, 522 (1962).

DEFINITIONS*

As used in the Disciplinary Rules of the Code of Professional Responsibility:

(1) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(2) "Law firm" includes a professional legal corporation.

(3) "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.

(4) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(5) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(6) "Tribunal" includes all courts and all other adjudicatory bodies.

(7) "A Bar Association" includes a bar association of specialists as referred to in DR 2-105(A)(1).

(8) "Qualified legal assistance organization" means a legal aid, public defender, or military assistance office; a lawyer referral service; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, and is not in violation of any applicable law.

(9) "Law clerk" means a person, typically a recent law school graduate, who acts, typically for a limited period, as confidential assistant to a judge or judges of a court; to an administrative law judge or a similar administrative hearing officer; or to the head of a governmental agency or to a member of a governmental commission, either of which has authority to adjudicate or to promulgate rules or regulations of general application.

(10) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties.

(11) "Participate" includes any action, directly or indirectly, through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise. By order of July 12, 1978, the District of Columbia Court of Appeals amended Definitions (7) and (8) and added Definitions (9) through (11). As adopted by the American Bar Association, Definitions (7) and (8) provide:

(7) "A Bar Association" includes a bar association of specialists as referred to in DR 2-105(A)(1) or (4).

(8) "Qualified legal assistance organization" means an office or organization of one of the four types listed in DR 2-103(D)(1)-(4), inclusive that meets all the requirements thereof.

*** "Confidence" and "secret" are defined in DR 4-101(A).**

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134– Newsletters as a Form of Advertising and Solicitation. DR 2-101, DR 2-103, DR 3-101(B)

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153– Withdrawal from Employment Due to Client's Past or Ongoing Fraudulent Acts. DR 1-102(A)(1) and (4), DR 1-103(A), DR 2-110(B)

154– Multiple Representation of FCC License Applicants. DR 4-101, DR 5-105(A) and (C)

155– Prepaid Legal Services Plan. DR 2-103, DR 2-106, DR 3-102, DR 5-105, DR 5-107

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170– National Telephone Lawyer Referral Service. DR 2-101, DR 2-103, DR 2-106, DR 4-101, DR 5-101, DR 5-105

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191– Retaining Client Files During Fee Dispute. DR 2-110(A)(2), DR 5-103(A)

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194– Restricting Lawyer's Right to Practice Law. DR 2-108(A)

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196– Financial Assistance for Client. DR 5-103(B), EC 5-8. *See also* Rule 1.8(d), *D.C. Rules of Professional Conduct*

197– "Of Counsel" and Division of Fees. DR 2-102(A), DR 2-107(A)

198– No-Fault P.I.P. Payments and Contingency Fee Agreement. DR2-106, EC 2-10

199– Communicating with Adverse Party. DR7-104(A)(1)

200– Fee Paid from Proceeds of Embezzlement. DR 2-106(A), DR2-102(A)(3), DR 2-102(A)(4)

201– Fee Sharing; Lawyer Referral Service; Nonprofit Legal Services Organization. DR 2-103(C), DR 2-106, DR 5-107(B)

202– Sale of Literary Rights; Contingent Fee. DR 5-104(B)

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208– Contingent Fee; Structured Settlement. DR 2-106(A), DR 5-103(A)(2)

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210– Representation of Criminal Defendants while Seeking Position With U.S. Attorney's Office. DR 7-101, DR 5-101. *See also* Rule 1.7, *D.C. Rules of Professional Conduct*

211– Fee Agreements; Mandatory Arbitration Clauses. DR 2-106(A), DR 6-102(A), EC 2-19, EC 2-23. *See also* Rule 1.5(b), Rule 1.8(a), Rule 1.8(g), *D.C. Rules of Professional Conduct*

212– Representation Adverse to Former Client. DR 4-101, DR 5-105. *See also* Rule 1.10(c), *D.C. Rules of Professional Conduct*

213– Obligation of Defense Counsel to Inform Court of Adverse Evidence. DR 4-101(B)(1), DR 7-102(A)(4), DR 7-102(A)(5), DR 7-102(B)(2)

214– Disclosure of Client's Name to Internal Revenue Service. DR 4-101(B), DR 4-101(C)(3). *See also* Rule 1.6(d), *D.C. Rules of Professional Conduct*

215– Communication With Potential Client Already Represented by Counsel. DR 7-104(A)(1), DR 2-104. *See also* Rule 4.2(a), *D.C. Rules of Professional Conduct*

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1-102 (A)(3)	Rule 8.4(b)
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2-102 (A)-(D)	Rule 7.5
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2-106 (A)&(B)	Rule 1.5(a)
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5-103 (A)(1)	Rule 1.8(i)
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5-105 (A)&(B)	Rule 1.7(b)
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5-107 (A)(1)	Rule 1.8(e)
5-107 (A)(2)	No counterpart
5-107 (B)	Rule 5.4(c)
5-107 (C)	No counterpart; see Rule 5.4(b)

DR	6-101 (A)(1)-(3)	Rule 1.1
	6-101 (A)(3)	Rule 1.3(c)
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DR	7-101 (A)(1)	Rule 1.3(b)(1)&(c)
	7-101 (A)(2)	No counterpart
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	7-101 (B)(1)	*See* Rule 1.2(a)&(c)
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	7-105	Rule 8.4(g)
	7-106 (A)	Rule 3.4(c)
	7-106 (B)(1)	Rule 3.3(a)(3)
	7-106 (B)(2)	No counterpart
	7-106 (C)(1),(3)&(4)	Rule 3.4(e)
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	7-106 (C)(5)	No counterpart
	7-106 (C)(6)	Rule 3.5(c)
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	7-107 (A)-(D)&(H)	Rule 3.6
	7-107 (E)&(F),(I),&(J)	No counterpart
	7-108 (A)&(B)	Rule 3.5(a)&(b)
	7-108 (C)	No counterpart
	7-108 (D)&(E)	Rule 4.4
	7-108 (F)&(G)	No counterpart
	7-109 (A)&(B)	Rule 3.4(a)
	7-109 (C)	Rule 3.4, Comment [8]
	7-110 (A)	Rule 3.5(a)
	7-110 (B)	Rule 3.5(a)&(b)
DR	8-101	No counterpart
	8-102	No counterpart
	8-103	No counterpart
DR	9-101 (A)	Rule 8.4(e)
	9-101 (B)	Rule 1.11(a)
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	9-103 (A)	Rule 1.15(a)
	9-103 (A)(1)	No counterpart
	9-103 (A)(2)	Rule 1.5(c)
	9-103 (B)(1),(3)&(4)	Rule 1.15(b)
	9-103 (B)(2)	No counterpart
	9-103 (C)	Rule 1.5(e)

The Legal Ethics Committee was established in 1974 to give advice to members of the Bar and the public on questions arising under the Code of Professional Responsibility. As of the date of publication of this edition of the Code, the Committee has rendered about 186 opinions construing the Code. Most of those opinions are published below for the benefit of members of the Bar. The exceptions are one opinion simply declining to answer a question and 10 opinions dealing with aspects of advertising or solicitation that appear to be obsolete in the light of the amendment of the advertising and solicitation provisions of the Code on July 12, 1978. Some opinions rendered under the previous advertising and solicitation provisions are published; they are especially designated in the Annotator to the Opinions that precedes these pages.

Opinion No. 2

Canon 2—Television Lectures by Attorney on General Legal Subjects for Education of Lay Public

An attorney asks whether it would be proper for him to prepare and deliver short, informative lectures on general legal subjects for television presentation. These lectures, each of which would be approximately one minute in length, would be produced by a professional film producer for sale to television stations throughout the country, and the attorney would be compensated for his appearances. The lectures would not respond to viewer questions or deal with specific legal problems of particular viewers. The topics would have no necessary relationship to areas of practice principally engaged in by the attorney or his firm, and neither the firm's name nor its address would be mentioned.

Canon 2 of the Code of Professional Responsibility enjoins lawyers to "assist the legal profession in fulfilling its duty to make legal counsel available." To this end, the legal profession must assume the function of educating lay people to recognize their legal problems (EC 2-1). Such problems may not be self-revealing and often are not timely noticed (EC 2-2). Therefore, lawyers should encourage and participate in educational programs concerning the legal system, with particular reference to legal problems that frequently arise (EC 2-2).

Of course, a lawyer who speaks for the purpose of educating members of the public should avoid saying anything that might mislead a lay person, such as by appearing to provide a general solution applicable to all individual situations of a similar nature (EC 2-5). Another practice that presents a risk of misleading lay people—one that the inquirer states he does not intend to employ—would be for the lawyer to deal with specific questions submitted or problems experienced by particular members of his audience (see ABA Formal Opinion 270). Finally, a lawyer should not in a public presentation make professionally self-laudatory statements calculated to attract lay clients (DR 2-101(A)).

Widely disseminated presentations of the type proposed by the inquirer can significantly enhance the public's awareness of common legal problems, thereby helping to fulfill an important responsibility of the legal profession. The fact that such programs may be commercially sponsored or that the attorney may be paid for his appearance does not necessarily detract from their propriety (ABA Informal Opinions 1094, 1179). Accordingly, on the basis of the factual details submitted by the inquirer, and within the framework of the considerations outlined above, the Committee is of the view that an attorney may properly engage in the activities covered by the inquiry.

The concurrence, which seeks to put a gloss on the opinion with which the majority of the Committee do not agree, should not be read as suggesting that a majority of the Committee think it appropriate that the Committee opine on constitutional questions; or believe that the provisions of the Code relating to advertising and solicitation raise constitutional questions; or think that the mere reference to a provision of the Code in an opinion of the Committee implies a view as to its scope.

Concurring opinion of two members:

In reaching its decision in this case, the Committee did not find it necessary to consider either the scope or the constitutionality of those provisions of the Code of Professional Responsibility relating to advertising and solicitation.

1974-7
April 23, 1975

Opinion No. 3

DR 2-103(A); DR 2-104(A)—Solicitation of Factual Information Necessary for Litigation from Yet Unnamed Plaintiffs.

We have been asked for our opinion whether it is proper for an attorney who represents named plaintiffs and an alleged but as yet uncertified class to solicit factual information needed for the successful prosecution of the litigation from individual members of the alleged class who are not named plaintiffs and who have not sought the attorney's advice or counsel. The request for information is to be in the form of a questionnaire and would be mailed to members of the alleged class under the letterhead of the attorney. A second question is whether it is appropriate for the attorney, having made the solicitation of information, to accept employment in connection with the litigation from individual members of the alleged class thus contacted.

The inquirer's concern is evidently prompted by the rule that it is generally improper for an attorney to recommend his own employment to someone who has not sought his advice or to accept employment from someone to whom he has given unsolicited advice to obtain counsel or take legal action. Code of Professional Responsibility DR 2-103(A). DR 2-104(A).

The use of the proposed questionnaire appears to be appropriate. The questionnaire is designed to gather information that the attorney needs to represent his client adequately. Moreover, we see no problem with the attorney accepting offers of employment that happen to follow from this solicitation of information. The attorney will not recommend in the questionnaire that he be retained by those interested in joining the litigation.

* * *

Concurring opinion of three members:

We believe it would be preferable for the questionnaire, even if prepared by or with the assistance of the attorney, to be sent on the letterhead of the client or a lay survey organization—so as to remove any appearance of solicitation of business by the attorney. The Committee divided evenly on a proffered amendment to add a statement to that effect in the principal opinion.

1974-5
March 25, 1975

Opinion No. 4

EC 2-19 — Propriety of Charging Fee for Preliminary Investigation of Client's Case in Absence of Agreement Between Attorney and Client

We have been asked to advise whether it is appropriate for an attorney to charge a fee when, prior to entering into any definite understanding regarding compensation or fees, the attorney concludes after preliminary examination that the case is not strong enough to pursue and so advises the prospective client.

Obviously the preferred course is for the attorney and client to agree at the outset whether there will be a charge for this preliminary investigation. See EC 2-19. A wide range of possible understandings are ethically permissible.

The inquiry put to us, however, concerns the situation in which the attorney and client do not have an explicit understanding regarding fees for the preliminary investigation. In such a situation, we believe it would be improper for the attorney to charge a fee unless it were clear from all the surrounding circumstances, including the level of sophistication of the client in dealing with lawyers

and specific prior dealings between the client and the attorney, or other attorneys, that payment of a fee in this case was or should have been contemplated by the client.

As between attorney and client, the attorney ordinarily has the greater experience with legal fee arrangements. Hence, the attorney bears the responsibility for seeing that there is no likelihood of misunderstanding as to fee arrangements. See EC 2-19.

1975-15
April 34, 2975

Opinion No. 5

DR 7-110; EC 7-35; Canon 20 — Lawyer Publishing in Legal Journal Discussion of Issues in Case Pending Before Appellate Court in Which Lawyer is Counsel

We have been asked to advise whether it would conflict with the Code of Professional Responsibility for a lawyer to write for publication in a legal journal an article discussing the issues in a case that is pending before a United States court of appeals. The lawyer would identify his interest in the litigation in the article to the court. All briefs in the case would have been submitted to the court and the case would already have been argued orally before the article appeared. The inquiry states that a petition for a writ of certiorari is likely to be filed with the Supreme Court to review any decision of the court of appeals.

So far as the possibility of the article's coming to the attention of the court and influencing its decision is concerned, the portions of the Code of closest relevance are DR 7-110 and EC 7-35. They prohibit ex parte communications with a court in an adversary proceeding. Possible conflict with these sections would be avoided if the lawyer supplied adversary counsel with a copy of his article.

The District of Columbia Court of Appeals has retained Canon 20 of the Canons of Professional Responsibility in lieu of DR 7-107(G) and (H) of the Code of Professional Reponsibility. Canon 20 condemns "newspaper publications by a lawyer as to pending or anticipated litigation." However, references in the Canon to "fair trial" and to "ex parte reference to the facts" indicate that it is directed more at attempts to sway a jury by extrajudicial references to facts at issue in a trial than to presentation of views on the law in a scholarly journal.

Also to be considered is the possibility of impairing the client's interests by the publication. The inquirer should bear in mind the different considerations that apply to briefs of an advocate and to scholarly articles written for publication. EC 7-4 states that an advocate "may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail." As the author of an article in a scholarly journal, a lawyer might not have that latitude. If any constraints on what the lawyer says as scholar could reflect unfavorably on the merits of his client's case when the journal article was compared with his briefs, he might run afoul of DR 7-101(A)(3).

We do not believe that it is unethical for a lawyer to express his views on the law in speech or writing in the absence of a substantial threat to the due administration of justice or impairment of the interests of his client. We do not see such a threat in this instance, nor does it appear, from what we are told, that the client's interests would necessarily be impaired by the publication.

We note that our conclusion is at variance with that of the only other legal ethics committee of which we are aware that has considered this precise question. The Legal Ethics Committee of the Indiana State Bar Association has ruled that it is "unethical for an attorney to write an article for publication pertaining to a question presently pending decision by a court in a case in which he is attorney of record. Such publication would be improper even though the article was to appear in a legal publication." Opinion No. 9 of 1964.

1975-20
April 23, 1975

Opinion No. 8

Canon 20 — Disclosure of Information to Newspaper Reporter by Lawyer During Arbitration Proceedings

A law firm in the District of Columbia asks whether it would be consistent with the Code of Professional Responsibility for it to furnish a newspaper reporter with a copy of its statement of claim on behalf of a client in an arbitration proceeding. Our conclusion is that the proposed action would not violate the Code as it is in effect in the District of Columbia.

The inquiring firm represents an agency of a foreign government in a contractual dispute with a construction contractor located in the United States. The dispute is subject to arbitration proceedings in the foreign country. The statement of claim is a long and detailed written statement that has already been submitted to the contractor as part of the initial steps leading to arbitration.

The contact between the firm and the newspaper reporter was initiated by the reporter, who requested a copy of the claim document and other information about the claim. The law firm confirmed the reporter's information that the claim existed, corrected information that was erroneous as to the amount of the claim, declined to furnish any additional information and sought the opinion of this committee as to whether it might furnish a copy of the detailed written claim. Though the inquiry does not so state, we assume that there is no restriction in the contract conferring the right of arbitration on the disclosure of information to outside parties.

The most nearly applicable provision of law in the District of Columbia is Canon 20 of the Canons of Professional Ethics, which has been retained by the D.C. Court of Appeals in lieu of DR 7-107(G) and (H) of the Code of Professional Responsibility. Canon 20 says:

> "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement."

The Canon does not by its terms apply to arbitration proceedings. It applies to matters tried or triable in the courts. The document that the law firm proposes to turn over to the newspaper reporter would, in a court proceeding, be a matter of public record. Therefore, we can see no objection under the spirit of Canon 20 to making the statement of claim available.

The Canon does appear to take a basic position in opposition to a flow of information to newspapers from lawyers for parties to litigation. This has generally been justified as a restriction on publicity-seeking by lawyers and on extrajudicial influences on the court. Here, the law firm did not seek out the newspaper. The document that the firm proposes to furnish is one that will go to the arbitrator as part of the arbitration proceeding. Also, the arbitrator is in a foreign country and would be unlikely to be influenced by the newspaper publication in any event. Even if these factors were not present, however, we would hesitate to interpret the Code of Professional Responsibility or the Canons of Professional Ethics in such a way as to thwart the communication of accurate factual information regarding legal proceedings to the press in the absence of a substantial threat to the due administration of justice.

Inq. 75-I-30
September 22, 1975

Opinion No. 9

DR 7-102(B)(1), DR 2-110(A) and (C)— Duties of Court-Appointed Counsel Who Has Knowledge of Client's Fugitive Status

A lawyer who has been appointed by a court in the District of Columbia to represent a person charged with a criminal offense inquires about the following situation. The client was released pending trial for the offense with respect to which the appointment was made in the custody of Bonabond under conditions that included the requirement that the client maintain an address he had given in the District of Columbia. The lawyer, attempting to make contact with the cli-

ent, discovered that the client had never lived at that address. Contacting a relative of the client, the lawyer further learned that the client currently lived in a neighboring state; and further, that he had failed to appear in a court of that state for trial on a criminal charge and so is a fugitive in that state. The lawyer is not a member of the bar in that state and, of course, his appointment is not concerned with the criminal charge there. The lawyer proposes to continue to represent the client, provided that the lawyer is able to make contact with him and that the client appears for the trial to which the lawyer's appointment pertains. The lawyer intends also to advise the client to turn himself in in the other state, but not to decline to represent him on the District of Columbia charge if the client fails to follow this advice.

The inquiry poses the questions whether (1) the lawyer has an obligation to disclose to the appointing court the client's misrepresentation to that court with respect to the client's local address or the client's failure to abide by the conditions of his release, even if the client appears for the trial in that court; and (2) whether the attorney has an obligation to disclose his knowledge of the whereabouts of the client to the authorities of the other state, in which he is a fugitive, if the client does not turn himself in there. Also raised, implicitly, is the question (3) whether, if the client declines to turn himself in in the other state, the lawyer may nonetheless continue to represent him in the case to which the appointment pertains.

As to the first question, we think the lawyer has no obligation to inform the District of Columbia court either of his client's misrepresentation or of his failure to abide by the condition of his release. The pertinent ethical provision is DR 7-102(B)(1)

> "A lawyer who receives information clearly establishing that . . . his client has in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same."

The client's actions here clearly enough constitute a fraud on the tribunal within the meaning of this Rule; and, although the initial misrepresentation probably occurred prior to the commencement of the lawyer's representation, rather than in its course, the failure to comply with the condition of release is a continuing matter that clearly extended into the period of the representation and so came within the language of this Rule. In such circumstances the Rule requires the lawyer to call upon the client to rectify the "fraud," for example, by advising Bonabond of his correct address. More than this the lawyer is not required to do under the Code as it is in effect in the District of Columbia. DR 7-102(B) as recommended by the ABA goes beyond the provision just quoted to provide that, "if his client refuses or is unable to do so, [the lawyer] shall reveal the fraud to the affected person or tribunal," but his clause was omitted from the provision as adopted here. (Moreover, the obligation under the ABA version of the Code has been mitigated. In 1974 the ABA amended the provision to add the phrase "except when the information is protected as a privileged communication" to what is quoted just above.) It is therefore clear that there is not under our Code an ethical obligation on the lawyer to blow the whistle on his client in these circumstances.

The second question, relating to the lawyer's ethical obligations with respect to his client's fugitive status in another state, could in other contexts raise issues as to the extent of a lawyer's obligation to courts of other jurisdictions where he is not a member of the Bar or where his representation does not relate to the other state; but these need not be dealt with here. Even if the lawyer's obligation to the courts of other states were no less than those he owed to the appointing court, his obligation would still be defined by DR 7-102(B), quoted above. The inquiring lawyer proposes to advise the client to turn himself in in the other state; he need not, under that Rule, go further and himself advise the tribunal if the client fails to heed his advice.

The third and final question raised is whether, even though there is no need for the lawyer to disclose his client's whereabouts to the court of the other state, he may nonetheless continue his representation of the client in the event the client fails to heed the advice to surrender in the other state. We think it clear that he may. DR 7-102(B) does not speak explicitly to the question of what a lawyer should do if the client fails to heed the call it obligates the lawyer to make. However, if the lawyer is not required to give sanction to his advice by reporting his client's misconduct it can hardly be intended that he apply the sanction of withdrawal from his representation. Indeed, the Rule draws a line between the lawyer's obligation to the court and his obligation to his client: where the former stops, the latter commences, and in this instance it is the lawyer's responsibility to continue to represent the client until he is relieved of the representation. We note that the inquirer states he proposes to continue to represent the client provided that he appears for trial. We remind the inquirer that DR 2-110(A) and (C) limit the circumstances in which a lawyer may withdraw from employment and impose upon the lawyer the obligation to ensure that his withdrawal does not prejudice the client.[1]

75-I-25
October 28, 1975

Opinion No. 10

DR 3-101, DR 3-102, DR 3-103—Competitive Bidding by Lawyer for Contract for Legal Services.

A lawyer asks whether there is any ethical prohibition against his responding to advertisements by government agencies seeking competitive bids for the performance of contracts which call for the skills both of lawyers and of persons in other occupations.

The inquiry seems to pose these two questions: (1) whether competitive bidding by a lawyer for the performance of legal services is ethically prohibited; and (2) whether ethical problems are presented if performance of the contract requires not only legal work but the skills of other professions or disciplines as well.

As to the first question, the Committee is of the opinion that there is no provision of the Code of Professional Responsibility that prohibits competitive bidding for legal services. In Formal Opinion No. 292, the ABA's Committee on Professional Ethics held that competitive bidding for legal services to a government agency was improper under the former Canons, but that opinion has been overruled by Formal Opinion No. 329.

As to the question whether the possible involvement of nonlawyers in the work to which the competitive bid would pertain poses ethical questions, the potentially relevant principle is that stated in Canon 3: "A lawyer should assist in preventing the unauthorized practice of law." The Canon is implemented by three Disciplinary Rules, which respectively prohibit lawyers aiding nonlawyers in engaging in the unauthorized practice of law (DR 3-101), dividing legal fees with nonlawyers (DR 3-102), and forming partnerships with nonlawyers for activities which include the practice of law (DR 3-103).[1] These Disciplinary Rules do not prohibit all association of lawyers and nonlawyers in projects which call for both legal and other skills. Rather, they require that where identifiable aspects of such projects fall within a lawyer's professional ken, so as to constitute the practice of law, the lawyer's professional responsibility for those aspects of the work should not be shared in specific respects with laymen.

The lines of demarcation between the matters to which legal skills and other skills are relevant are not, of course, invariably clear or mutually exclusive, and collaborative efforts between lawyers and members of other disciplines cannot always be conducted effectively in a wholly compartmentalized fashion. As a general matter, however, it appears that as respects the kinds of governmental contracts to which the present inquiry is directed, where performance of the contracts will require both strictly legal work, which may not properly be performed by laymen, and other work which may, there should be no ethical problem on this account so long as (1) the services to be pro-

[1]The subject matter of this opinion has been referred by the Committee to its Subcommittee on the Code, which is its law reform arm, for study. The opinion is based on the Code as it now reads.

[1]The matter of lawyer-layman business associations has been referred by the Committee to its Subcommittee on the Code, its law reform arm. This opinion is based on the Code as it now reads.

vided by nonlawyers are non-legal services; (2) to the extent that nonlawyers receive a portion of the fees to be paid, that portion pertains only to non-legal portions of the work performed; and (3) the legal services are not to be performed by a partnership which includes both lawyers and nonlawyers.

Inq. 75-I-33
October 28, 1975

Opinion No. 11

DR 2-106(A)—Imposition of Finance Charge or Interest on Unpaid Fees for Legal Services.

We have been asked to advise whether an attorney may charge clients a "finance charge or interest" on an unpaid bill for legal services and, if so, what the proper rate of interest would be.

The most closely applicable provision of the Code of Professional Responsibility is DR 2-106(A), which states merely that a lawyer shall not charge "an illegal or clearly excessive fee." We do not believe that the imposition of a finance charge or interest on unpaid fees for legal services is a violation of DR 2-106(A).

Though no canon or disciplinary rule speaks explicitly to the matter of interest on unpaid fees, the customary practice of lawyers has been not to make such charges. We believe that a departure from that custom is proper only if clearly agreed to be the client, in advance of representation or in advance of a new stage of representation. An agreement for the imposition of interest or a finance charge that is entered into during the course of representation, where there was no such agreement at the outset, would be improper if by reason of his representation the lawyer had acquired an unfair advantage in negotiations—as where the client's cause would be significantly impaired by the lawyer's withdrawal.

Where representation has terminated and the client's account is delinquent, there would be no objection to a new agreement for the imposition of interest on arrearages, provided that the client received some consideration for acceptance of the new charge. Forbearance by the lawyer of collection efforts by legal action would constitute such consideration.

In considering whether legal fees may properly be financed through bank credit cards, the ABA Committee on Ethics and Professional Responsibility has stated that interest may be charged on delinquent accounts "providing the client is advised that the lawyer intends to charge interest and agrees to the payment of interest on accounts that are delinquent for more than a stated period of time." ABA Formal Opinion No. 338, November 16, 1974. We do not advocate the charging of interest on unpaid legal fees, but we agree with the basic approach of ABA Formal Opinion No. 338 as to the permissibility of such charges and the necessity for a clear understanding on the part of the client that they will be imposed. As with all agreements for legal fees where there is a possibility of misunderstanding, it would be eminently advisable that fee arrangements contemplating the imposition of interest be reduced to writing.

The inquiry also asks what the proper rate of interest would be. DR 2-106(A) prohibits charging an illegal fee. Any lawyer contemplating the charging of interest or a finance charge should scrupulously observe the requirements of the usury and consumer protection laws. See D.C. Code, Tit. 28, Ch. 33 and 38; 15 U.S.C. Ch. 41. The question whether an interest or finance charge is nonusurious and does not violate consumer protection laws may nevertheless be "clearly excessive," in violation of DR 2-106(A), would depend on all the circumstances of a particular case.[1]

Inq. 75-I-23
November 24, 1975

Opinion No. 14

EC 2-31, EC 2-32, DR 2-110(H)(2); Canon 4, EC 4-1, EC 4-4, EC 4-5, DR 4-101; EC 5-12, EC 5-15, EC 5-17, EC 5-18; EC 7-2—Duty Attorney Owes to Former Client Whom Attorney Represented in Connection with Civil Investigation by Government Regulatory Agency—Attorney's File on Former Client Subpoenaed by Grand Jury.

We have been asked several questions concerning, in general, the duties an attorney owes a former client whom the attorney represented individually in connection with a civil investigation by a government regulatory agency when the attorney's files relating to the former client are subpoenaed by a grand jury. The former client was represented jointly with a corporate client that subsequently waived its attorney-client privileges. More specifically, we have been asked the following:

1. Whether and when an attorney who is served with a grand jury subpoena duces tecum to produce documents relating in whole or in part, or possibly relating in whole or in part, to a former client is required to notify that former client of the receipt of the subpoena.

2. Whether the attorney is required to provide the former client's successor attorneys with a copy of the subpoena in question and whether he is required to do so when the attorney believes that only portions of the subpoena call for documents relating solely to his representation of the former client and that other portions of the subpoena relate either to his representation of the former client jointly with other clients, or relate solely to other, unrelated clients.

3. Whether the attorney should, prior to production of the documents in compliance with the subpoena, provide the former client's successor attorneys with access to, or copies of, the documents under subpoena that relate either solely to the former client or jointly to the former client and other clients so that the successor attorneys can present to the court claims of privilege or other objections prior to production, or whether the attorney, as the recipient of the subpoena, is the only one entitled to determine, prior to production, which documents are privileged or arguably so.

4. Whether the attorney may assert a work-product privilege against his former client as to internal attorney work-product documents in his files relating either solely to the client or jointly to him and other clients produced during the lawyer-client relationship, particularly when such documents are requested by the former client to assist him in preparing for a grand jury investigation or other legal proceeding, or whether the attorney may do as he wishes with such documents. Also, we are asked whether the attorney has a duty to assert a work-product privilege on behalf of his former client when work-product documents relating to representation of him are subpoenaed, and whether the attorney may assert the privilege against his client as to those documents he does in fact disclose to third parties or proposes to disclose.

We note at the outset of this opinion that in one case that has come to our attention a trial court in another jurisdiction ruled upon the professional responsibilities of members of the D.C. Bar in circumstances similar to those presented in the questions posed to us. This trial court opinion diverges from ours in some respects. The existence of this out-of-state opinion, far from foreclosing us from setting forth in this opinion guidelines for the future conduct of members of the D.C. Bar, emphasizes the desirability of our doing so. The questions presented are important and are not squarely answered by the terms of the Code of Professional Responsibility. In issuing the opinion, we do not mean to pass judgment on any actions inconsistent with this opinion that may have been taken by members of the bar before this opinion was published.

I

The Code of Professional Responsibility emphasizes that a lawyer should preserve the confidences and secrets of his clients. Canon 4; EC 4-1; DR 4-101; and that he should "not use information acquired in the course of representation to the disadvantage of the client," EC 4-5; DR 4-101(B)(2). Not only must the attorney preserve those client's "confidences" that are protected by the attorney-client privilege (which relates to communications from the client to the attorney) but also "secrets," which the Code says include "information gained in the professional relationship...the disclosure of which would be embarrassing or would be

[1]The subject matter of this opinion, along with related matters, has been referred by the Committee to its Subcommittee on the Code, its law reform arm, for study. The opinion is based on the Code as it now reads.

likely to be detrimental to the client." DR 4-101(A). Moreover, this ethical obligation to guard the confidences and secrets of a client, unlike the evidentiary attorney-client privilege, "exists without regard to the nature or source of information or the fact that others share the knowledge." EC 4-4.

EC 4-6 provides that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment." A lawyer's continuing obligation to a client whose representation he once undertook is underscored by those provisions of the Code that deal with the necessity of taking steps to avoid prejudicing a client as a result of termination of the representation. EC 2-31 provides generally that lawyers who undertake representation should complete the work involved and, more specifically, trial counsel for a convicted defendant should represent him through the appeal (unless new counsel is substituted). EC 2-32 provides further than when an attorney declines to proceed with a case on appeal he should endeavor "to minimize the possible adverse effect on the rights of his client," and DR 2-110(H)(2) provides: "In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client...."

EC 2-32 provides specifically that an attorney not continuing a client's representation should, *inter alia,* deliver to the client all papers and property to which the client is entitled, cooperate with counsel subsequently employed and otherwise attempt to minimize the possibility of harm. See also ABA Informal Opinion No. 724, Dec. 27, 1963.

A lawyer is excused from his ethical duty to preserve a client or former client's confidences and secrets when he is required to disclose them by law or court order. DR 4-101(C)(2). The question before us is how the attorney discharges his ethical responsibilities when documents come into his possession or are obtained or produced by the attorney during the course of his representation of a client and those documents are subsequently subpoenaed by a grand jury.

It is our opinion that, when documents are subpoenaed or an effort is otherwise made to compel their disclosure, it is the lawyer's ethical duty to a former client to assert on the former client's behalf every objection or claim of privilege available to him when to fail to do so might be prejudicial to the client. This rule is settled in the case of an existing attorney-client relationship. See *Schwimmer* v. *United States,* 232 F. 2d 855, 863 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956), for a statement of an attorney's duty to assert any applicable attorney-client privilege. *Accord:* EC 4-4, which provides: "A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client." For reasons stated above, the rule should not be different in the case of an attorney-client relationship that has terminated.

We think, then, in answer to the first question posed, that in order to "minimize the possibility of harm" to a former client, EC 2-32, an attorney should promptly notify his former client when he receives a subpoena asking for documents that came into his possession during the course of the representation of that former client or documents that affect or may affect that former client, irrespective of whether the attorney knows at the time of the receipt of the subpoena that he still has in his possession any specific documents arising during the attorney-client relationship. If there is any possibility whatever that the attorney has in his possession any subpoenaed document affecting the interest of his former client, which came into his possession from any source whatever during the course of that representation, he should immediately, upon receipt of the subpoena, notify the former client.

II

Our answer to the second question is that the lawyer need not provide the former client's successor attorneys with a copy of the subpoena but, if the lawyer believes that the disclosure of extraneous portions of the subpoena would risk prejudice to other clients, only with a copy of those portions of the subpoena that the lawyer believes relate to the former representation. In fulfillment of his obligation to his former client the lawyer is not obliged to risk unwarranted disclosures of confidences or secrets of other clients and indeed is ethically forbidden to do so.

III

Our answer to the third question is that the lawyer should provide to the former client or to the attorneys now representing the former client copies of or access to all documents called for by the subpoena that relate either solely to the former client or jointly to the former client and other clients so that the successor attorneys can determine or assist in determining as to which document claims of privilege should be made.

The attorney should zealously guard against the erroneous release, by production in court in response to the subpoena, of any documents that represent confidences or secrets obtained by the attorney in the course of his representation of the former client.

The attorney should resolve any disagreements with his former client as to the validity of any claims of privilege in favor of the client or should let the former client have an opportunity prior to production to assert any objection or claim of privilege that he, or successor attorneys acting on his behalf, think applicable. As a practical matter, this means that the attorney should provide the client, or his successor attorneys, prior to production, with access to or copies of the documents at issue so that they can properly frame and present to the court their objections or claims of privilege.

EC 5-12 is apposite here. That provision requires that, when co-counsel are unable to agree on a matter vital to the representation of their client, "their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken." We believe that this precept applies also to those situations involving a client's present and former counsel.

We recognize, as does the Code of Professional Responsibility, that lawyers may disagree on a matter vital to the representation of their client. We also note that "The bounds of the law in a given case are often difficult to ascertain." EC 7-2. In particular, attorneys can honestly differ among themselves over such issues as whether a grand jury subpoena is valid, or whether it calls for a particular document in question, whether a particular document is a privileged communication between the attorney and the client, or is otherwise privileged, or whether a particular document belongs to the client and contains self-incriminatory information that would form the basis for a claim of Fifth Amendment privilege.

Thus, where there are disagreements between present and former counsel as to the existence of any objections or privileges, with respect to subpoenaed documents that came into the possession of the former counsel from any source during the course of representing the client, the client should determine which attorney—his former attorney or his present attorney or both—should review the subpoena and documents at issue and present objections to the court, together with the documents *in camera* if requested by the court, prior to their production in compliance with the subpoena. The attorney should not disclose any document as to which the client, or his successor attorneys acting on his behalf, assert an objection or privilege but as to which he believes the objection invalid or the privilege unavailable. Rather, the attorney should first present the document to the court and inform the court of the disagreement. At the same time, the client or his new attorneys can also present to the court their arguments for nondisclosure. Having thus satisfied his ethical duties towards his former client, the attorney is then free to comply with whatever directive the trial court gives.[1]

[1]In the case of an existing attorney-client relationship, if an attorney disagrees with an existing client as to the validity of a particular objection or privilege, or whether failure to assert it entails potential prejudicial harm to the client, he should not prejudice his client or render the issue moot by himself producing the documents called for but rather should, prior to production, present the impasse to the appropriate court for adjudication, and give his client an opportunity to present

his claims to that court also. See EC 7-7. By first allowing the client to assert whatever arguments against disclosure he thinks appropriate, the attorney best discharges his ethical duties to the client. The public interest is also protected since the court can review the documents at issue *in camera* and decide the validity of any claimed objections or privileges. (Of course the attorney may not suppress the fact that such documents are in his possession. EC 7-27.)

This is the course to be followed even when the attorney believes the client's assertion of privilege to be a frivolous one. An attorney may withdraw from representation of a client if he believes the client's claims to be frivolous and the client persists in asserting them, but he should not foreclose his client's opportunity to present his claims. See Anders v. California, 386 U.S. 738 (1967); McCartney v. United States, 343 F. 2d 471, 472 (9th Cir. 1975).

IV

We turn now to the questions relating to documents in the attorney's files considered by the attorney or his former client to be the attorney's work product produced by him for the purpose of representing the client. Such work product may well be considered the property of the attorney, but we need not concern ourselves here with that issue. We believe that the attorney's ethical duty to preserve his client's confidences and secrets discussed above extends also to the attorney's work product produced during the course of the representation.[2] Certainly, if the attorney, for any reason, has breached this responsibility and made such work product available to third parties, under no circumstances should he refuse to make it available also to the former client for whose benefit, or at least joint benefit, it was produced. Moreover, we believe that there is no requirement in law or in ethics that an attorney *not* disclose such work product to his former client in any event. Indeed, under his general duty to cooperate with a former client's new counsel discussed above, and to do all that he can to minimize the possibility of harm arising as the result of his withdrawal from representation of that client in succeeding or related litigation, we think that he should turn over to his former client, or the client's successor attorneys, that portion of his work product which is necessary to the adequate representation of the client.

As with any privilege existing either wholly or partially for the benefit of clients, it is our opinion that an attorney has an ethical duty to assert the work-product privilege whenever applicable when documents in the attorney's files are subpoenaed. Even though the attorney work-product privilege is technically considered the attorney's to assert in a court rather than the client's, the underlying purpose of the privilege is, at least partially, to protect and further the effective representation of clients. See *Hickman* v. *Taylor*, 329 U.S. 495, 514-15 (1947) (Jackson, J., concurring). Therefore, the attorney should not divulge such work product when to do so would work to the disadvantage of a client.

* * *

None of our answers is affected by the fact that the representation of the client in question was a joint representation, along with a corporate client that subsequently waived its attorney-client privilege. That waiver frees the lawyer to produce documents that relate solely to the corporate client so far as any claims to confidentiality by it are concerned, but it does not free him to disclose documents that relate in any way to the former individual client. In this regard, note that, when an attorney undertakes to represent a corporate officer in his individual capacity and also to represent the corporation, documents obtained or produced during such joint representation frequently, if not invariably, intertwine the interests of the joint clients. Such joint representation is fraught with potential conflict and a lawyer should represent a corporate official in his individual capacity and also represent the corporation only if the lawyer is convinced that differing interests, or potentially differing interests, are not presented. EC 5-15; EC 5-17; and EC 5-18.

75-I-24
January 26, 1976

Opinion 16

Canon 9, EC 9-3, DR 9-101(B)—Limitations on Private Employment of Lawyer Formerly in Government Service

A practicing attorney in the District of Columbia, who was formerly the Assistant Director of the Office of Contract Administration of a government agency, inquires as to the limitations imposed by the Code of Professional Responsibility on his representation of private clients in dealings and disputes with that agency.

The controlling provision of the Code is DR 9-101(B), which states:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

This disciplinary rule appears in the Code under Canon 9, which states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." EC 9-3, under that Canon, also makes clear that the purpose of the disciplinary rule is to "avoid the appearance of impropriety, even if none exists."

The inquiring attorney proposes to decline representation in "any matter in which I personally and substantially participated prior to my leaving" and also in "any matter involving circumstances in existence and which had been submitted for resolution to the Office of Contract Administration as a result of its official responsibilities prior to my leaving even if I had no actual knowledge of the matter prior to my leaving." The General Counsel of the agency has taken the position that DR 9-101(B) would bar the inquiring attorney from undertaking representation with respect to any contracts which were in existence and for which the Office of Contract Administration was accountable, during the period that the attorney served as Assistant Director of that office.

Our view basically coincides with that of the inquiring attorney, although we are unable to state an interpretation that will resolve in advance the propriety of representation in all factual circumstances. The positions of the inquiring attorney and the General Counsel of his former agency appear to differ principally as to the propriety of representation of private parties in investigations, negotiations and disputes related to contracts which were in existence, and for which the Office of Contract Administration was accountable, during the period that the inquiring attorney served as Assistant Director of that office, but concerning which the inquiring attorney played no substantial role while in that office and as to which the circumstances giving rise to the need for representation came into existence after he left the office.

The resolution of this difference requires initially a determination of whether the word "matter," as used in DR 9-101(B), should be interpreted broadly, to refer to contracts administered by a public agency, or more narrowly, to refer to particular sets of factual circumstances and controversies arising under such contracts. We believe that DR 9-101(B) should be interpreted broadly to prohibit representation with regard to any contracts as to which the inquiring attorney had substantial responsibility while at the agency, even though the facts and circumstances giving rise to the need for representation may have come into existence after he left the agency.

This interpretation seems to us to be consistent with what we perceive to be two of the primary purposes of DR 9-101(B). One is to prevent the appearance that a lawyer in public employment may have been influenced in his actions as a lawyer by the hope of later personal gain in private employment rather than by the best interests of his public client. See present Canon 5 and ABA Formal Opinion 37. The second purpose is to prevent the appearance that a lawyer may be utilizing for the benefit of a private client confidential information obtained in a prior attorney-client relationship with a public agency having interests in conflict with those of his private client. See EC 4-5 and ABA Formal Opinion 134.

Under either view of DR 9-101(B), there could be an appearance of impropriety if the inquiring attorney were to undertake representation of a private client with regard to a

[2] In this connection, see EC 4-6, providing that, when an attorney retires from practice, his work product should either be destroyed or delivered to another attorney and that the client's option as to method of disposition should be a dominant consideration.

contract as to which he had substantial responsibility while in his public employment. It could appear that he may have been influenced in his actions or decisions relating to the negotiation, drafting or administration of that contract by the hope of later obtaining the private contractual party as a client. Similarly, because of his access to government discussions and memoranda pertaining to that contract, the public would have no assurance that he was not advantaged in later representation of the private party by confidential information obtained while representing his public client.

We note that the word "matter" is used to include "contract" in a federal statute dealing with the same subject matter. See 18 U.S.C. § 207(b). That statute disqualifies any former governmental employee from acting as attorney for anyone other than the government for a year after termination of governmental employment, in connection with "any...contract...or other particular matter" in which the government is interested, and which was under the attorney's "official responsibility" while with the government. However, both the inquiring attorney and the General Counsel of his former agency have indicated that the quoted statute is not directly applicable because the agency in question is not an agency of either the federal or the District of Columbia government. DR 9-101(B) appears to be the only applicable limitation.

For the same reason, the words "official responsibility" in the statute do not control the extent of the inquiring attorney's role, with regard to contracts, which would disqualify him from undertaking private representation pertaining to those contracts. "Official responsibility" is defined for purposes of 18 U.S.C. § 207(b) as the "direct administrative or operating authority, whether intermediate or final, and exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct governmental action." 18 U.S.C. § 202(b).

While this definition indicates the broad interpretation which Congress meant to place on the word "responsibility" for purposes of federal conflicts of interest prohibitions, it must be noted that the definition nowhere contains the word "substantial." That word does, however, appear in DR 9-101(B)—immediately before the word "responsibility." We are unable to determine how much responsibility with regard to a government contract is "substantial," within the meaning of DR 9-101(B), without having before us the full facts as to a particular contract and the role which the inquiring attorney played in the drafting, negotiation, execution or administration of that contract.

We doubt that the mere fact that the contract was one for which the Office of Contract Administration was accountable would be enough to connote "substantial responsibility." At the same time, we do not believe the words "substantial responsibility" necessarily require a showing of actual, personal participation, if there was participation by subordinates working in such a close relationship to the inquiring attorney that it would appear "unlikely that he did not become personally and substantially involved in the investigative or deliberative processes." See discussion at footnote 30 of ABA Formal Opinion 342 (Nov. 24, 1975).

The size, structure and operations of the Office of Contract Administration, as well as other facts concerning the attorney's particular role as to a particular contract, could all have a bearing on a determination of "substantial responsibility" with regard to a particular contract. While it would be helpful to the inquirer if a rule could be laid down which would resolve in advance and with certainty all questions which might arise concerning interpretation of the term "substantial responsibility" in DR 9-101(B), neither the language of the rule nor the variety of possible combinations of facts which could arise under the rule will permit that.

Inq. 75-10-3
March 22, 1976

Opinion No. 19

Designation of Paralegal Employee as "Legal Assistant" on Business Card

We have been asked whether it is ethically proper to designate a para-legal employee as a "legal assistant" on a business card.

ABA Informal Opinion 1185, May 31, 1971, approves the practice. The term "legal assistant" has come into general use to describe a person who is a lay person to an attorney. Inasmuch as the term does not imply that the assistant is a member of the bar and engaged in the practice of law, such a listing is not misleading and does not appear to be in conflict with any of the disciplinary rules relating to the use of business or professional cards.

1974-6
June 28, 1976

Opinion No. 20

DR 7-109(C)—Contingent Fee for Expert Witnesses — Constitutionality — Constitutional Questions Beyond the Scope of the Committee

The inquirer is an attorney who represents 14 plaintiffs in a pending antitrust suit in the United States District Court for the District of Columbia. He states that the nature of his case is such that it will require competent and comprehensive economic analysis and expert economic testimony, but that the plaintiffs do not have adequate financial resources to employ the necessary economic expert witnesses. He has indicated, however, that a firm of economic consultants is willing to be retained in connection with the litigation on a modified contingency agreement.

The inquirer requests our opinion as to whether this is permissible under the Code of Professional Responsibility. He states that he "would propose to offer to a qualified economic expert and counsel the terms and conditions set forth in the attached draft agreement, conditioned upon your prior approval." The attached agreement provides for payment, at least in part, on a contingent basis. The inquirer also directs our attention to a decision of the United States District Court for the Southern District of New York in *Carl E. Person* v. *The Association of the Bar of the City of New York, et al.*, 414 F. Supp. 144. This opinion held that DR 7-109(C), which, in the court's words, "proscribes the payment of reasonable fees for the professional services of expert witnesses if payment of the fees is conditioned on the outcome of the case," is unconstitutional.

DR 7-109(C) provides that "[a] lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case." This disciplinary rule clearly forbids the course of action proposed by the inquirer. The inquirer does not question this but rather asks us to pass upon the validity of the rule as it applies to his proposed course of action. However, it is not within the province of the Legal Ethics Committee to pass upon the constitutionality of any provision of the Code of Professional Responsibility. Although the Committee would obviously interpret any provision in such a way as to avoid an unconstitutional application if that interpretation of the Code were reasonably possible, there is no ambiguity in the language of DR 7-109(C) and no room for interpretation. The provision flatly prohibits the conduct proposed by the inquiring attorney and, indeed, there can be little question that the provision was directed at just such practice as the inquiring attorney intends to engage in.*

Accordingly, it is the view of the Committee that, if the inquiring attorney requires immediate relief, his only recourse is to seek it in the courts, which, unlike the Committee, would have the authority to adjudicate the constitutionality of the provision of the Code in question, as the District Court for the Southern District of New York has done.

September 27, 1976
Inq. No. 76-9-26

Opinion No. 21

EC 5-8—DR 5-103(B)—EC 7-7—DR 2-110—DR 7-101—Advancing Costs of Litigation—Dismissal of Suit Without Client's Consent

*The question whether DR 7-109(C) should be amended, in the light of the considerations set forth in the District Court's opinion, has been referred by the Committee to its Subcommittee on the Code, its law reform arm.

A District of Columbia attorney requests our opinion with regard to certain questions of professional ethics arising in connection with his representation of a District of Columbia resident in pending litigation in a federal district court in another jurisdiction. Initially, we observe that our rules state that we "will not ordinarily give opinions on specific matters involved in pending litigation." However, we interpret that limitation as intended to refer only to questions of ethics that are or are likely to become directly in issue in such litigation and not to preclude our expressing opinions on questions of ethics simply because they relate to the representation of a client in pending litigation.

Since this particular litigation is pending in a court outside the District of Columbia, we note that the inquiring attorney may have ethical responsibilities other than those imposed by reason of his membership in the District of Columbia Bar. We speak only to his responsibilities as a member of the District of Columbia Bar. He is, of course, responsible also for observing any additional requirements that may be imposed in the jurisdiction in which he is appearing by special leave of a court located in that jurisdiction. Moreover, if questions of professional responsibility should become an issue in that litigation, the ruling of that court would naturally take precedence over any conflicting advisory opinion from this Committee.

The inquiring attorney filed a suit for his client, in association with local counsel in the foreign jurisdiction, seeking damages arising from an automobile accident in that jurisdiction. The suit was subsequently settled with the oral authorization of the client; but upon receipt of the release and settlement check the client changed her mind, repudiated the settlement and announced a desire to go to trial. The attorney moved for leave to withdraw on the basis of the repudiated settlement agreement, but the motion was denied. See DR 2-110(A)(1), stating that a lawyer may not withdraw from employment in a proceeding before a court without leave of court where leave is required by the rules of the court.

The retainer agreement calls for the client to pay all costs of suit. Certain costs have already been advanced by the attorney and have not been reimbursed by the client. Two out-of-town witnesses will be required at the trial, one of them a physician. The attorney anticipates, from recent contacts with his client, that she will not comply with his request to provide funds for the cost of subpoenas, travel expenses and physician's expert witness fee. He does not wish to advance any more costs in view of his client's failure to reimburse prior costs, the risk of non-recovery and the likely amount of recovery if the suit should be successful.

The attorney asks, first, whether he is obligated by the Code of Professional Responsibility to advance the remaining costs of going to trial if the client does not pay them. Second, he asks whether the Code would permit him to dismiss the suit on the day of trial if the necessary witnesses were not available as a result of the client's having failed to pay the costs of their appearance.

The answer to the first question is that, if the attorney has assumed no contractual obligation to his client to advance the costs of trial, he is not obligated to do so by the Code. DR 5-103(B) permits a lawyer to advance the expenses of litigation, provided that his client remains ultimately liable for such expenses, but neither that rule nor any other part of the Code requires that a lawyer make such advances. EC 5-8, in fact, states that "this assistance generally is not encouraged."

The answer to the second question is that the Code will not permit the lawyer to dismiss the suit without the client's consent. EC 7-7 states that the "authority to make decisions is exclusively that of the client," except for decisions "not affecting the merits of the cause or substantially prejudicing the rights of a client." Neither exception, of course, would apply to the dismissal of a suit. The lawyer may recommend dismissal and has an obligation to do so if in his judgment the suit is futile without the out-of-town witnesses; but he may not dismiss without the client's consent.

If the client fails or refuses to provide funds to bring the necessary witnesses to court, and the lawyer knows that without them he cannot prove what he must prove in order to prevail at trial, he may renew his motion to the court for leave to withdraw. He might well cite, as grounds for such a motion, DR 2-110(C)(1)(d) and (f), permitting such requests where a client by any conduct "renders it unreasonably difficult for the lawyer to carry out his employment effectively" and where the client "[d]eliberately disregards an agreement or obligation to the lawyer as to expenses or fees."

Withdrawal from employment in such circumstances is permissive, not mandatory, and if made at or near the opening of trial would raise considerations other than those simply of professional responsibility. We naturally express no opinion as to what the ruling of the court on such a motion should be. If the court should deny the motion, the lawyer would have no choice but to continue representation through the trial, presenting such evidence and authorities as are available to him, even though the likely result would be a directed verdict at the end of plaintiff's case.

In expressing our opinion that the course of conduct outlined herein is consistent with the Code of Professional Responsibility, we do not mean to indicate that it is required by the Code. Particularly if the client's failure to provide funds to bring necessary witnesses to trial is a result of the client's modest financial circumstances, the lawyer may wish to advance those funds. However, the lawyer is not bound to do so and he may understandably feel that, by repudiating the previously arranged settlement agreement, the client has forfeited any claim to continued advances.

We wish also to invite the attention of the inquiring attorney to the provisions of DR 2-110, stating that a lawyer "shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client." DR 7-101 provides generally that a lawyer "shall not intentionally...[p]rejudice or damage his client during his professional relationship." These rules require that the client in this case be given adequate advance notice of the consequences of failing to provide costs and also of any intention of the lawyer to seek leave to withdraw if those funds are not provided.

September 27, 1976
Inq. No. 76-8-25

Opinion No. 23

Canon 2—Use of Credit Cards for Paying for Legal Services

A member of the Bar inquires whether it is ethically proper for attorneys to permit their clients to make payments for legal services through the use of credit cards.

Subject to the limitations and conditions specified below, we believe that credit card payments by clients are proper. The limitations and conditions are, with some modifications, those stated in Formal Opinion 338 of the ABA Committee on Ethics and Professional Responsibility, dated November 16, 1974. In that opinion the ABA Committee said that it believed that the Code of Professional Responsibility had overruled ABA Informal Opinion 1176, which was to the effect that it was unprofessional under the Canons of Professional Ethics for lawyers to allow the use of credit cards to pay for their legal services. We agree.

These are the conditions and limitations on the permitted use of credit cards that this Committee, in general agreement with the ABA Committee, believes are required by the Code:

1. All publicity and advertising relating to a credit card plan shall satisfy all pertinent requirements of the Code;[1]

2. No directory of any kind shall be printed or published of the names of individual attorney members who subscribe to the credit card plan;

3. No promotional materials of any kind will be supplied by the credit card company to a participating attorney except possibly small insignia to be tactfully displayed in the attorney's office indicating his participation in the use of the credit card;

4. A lawyer shall not encourage partici-

[1]The ABA Committee proposes as the first condition that all publicity and advertising relating to a lawyer's participation in a credit card plan be subject to the prior approval in writing of the cognizant state or local bar committee. This committee rejected a prior approval requirement.

pation in the plan, but his position must be that he accepts the plan as a convenience for clients who desire it; and the lawyer may not because of his participation increase his fee for legal services rendered the client;

5. Charges made by lawyers to clients pursuant to a credit card plan shall be only for services actually rendered or cash actually paid on behalf of a client;

6. In participating in a credit card program the attorney shall scrupulously observe his obligation to preserve the confidences and secrets of his client.[2]

The ABA Committee said, correctly, that "[a] necessary corollary to the use of credit cards is the charging of interest on delinquent accounts." This Committee's views on the general question of lawyers' charging interest on delinquent accounts are stated in its Opinion No. 11.

Inquiry No. 12
December 17, 1976

Opinion No. 24

Canon 2—EC 2-2—DR 2-104(A)(4)—Participation of Law Faculty in "Ask the Lawyer" Radio Program

A local radio station has asked the cooperation of a university in broadcasting an "Ask the Lawyer" program, during which members of its law faculty would give answers to specific legal problems telephoned in by listeners. The university asks whether the involvement of the law faculty members in this program would be ethical.

As the Committee stated in its Opinion No. 2, lawyers should encourage and participate in educational programs on legal subjects, especially as they relate to legal questions that frequently arise. (EC 2-2.) By enhancing the ability of lay persons to recognize legal problems, such programs help fulfill the legal profession's responsibility to ensure that legal counsel is available to those who need it. (Canon 2; EC 2-1.)

The present inquiry covers a program in which specific legal quetions submitted by listeners will be answered. While similar practices were called in question under Canon 40 of the former Canons of Professional Ethics and interpretations thereof (see ABA Formal Opinions 162, 270; and see EC 2-5, note 15), the only specific coverage of the issue in the Code of Professional Responsibility is an indication that a lawyer who gives individual advice in the course of speaking publicly on legal topics may not accept employment resulting from that advice. DR 2-104(A)(4).[1]

In Opinion No. 2, the Committee observed that an attorney's answering specific questions submitted by members of an audience may result in misleading lay persons. The obvious constraints imposed by a telephone interview during a radio broadcast may inhibit the attorney's eliciting the information he needs in order to give proper advice to the questioner. Moreover, other listeners may be misled into thinking that their problems are sufficiently similar to one on which advice had been given as to justify their relying on that advice. See EC 2-5.

The Committee is of the view that attorneys may properly participate in programs of the general type covered by the inquiry, provided that the format of the program is carefully designed as to minimize the risk of misleading either the questioner or other listeners.

Inquiry No. 17
December 17, 1982

Opinion No. 25

EC 2-19—Fee Arrangements—Lawyer's Responsibility to Make Clear to Client—Necessity for Writing

We have been asked by the District of Columbia Bar Citizens' Advisory Committee to clarify the issue of fee relationships between lawyers and clients. As evidenced by that committee's continuing correspondence and interest in this issue, we believe that the question is one of substantial importance and immediacy to the community at large as consumers of legal services.

In Opinion No. 4, we dealt with this subject for the first time. We there opined that, in the absence of an explicit agreement or implied understanding, a prospective client may not ethically be charged for a preliminary investigation that leads to the conclusion that the case is not worth pursuing. We stated the more general proposition that "the attorney bears the responsibility for seeing that there is no likelihood of misunderstanding as to fee arrangements." The Citizens' Advisory Committee has asked our opinion on a number of specific points not covered in Opinion No. 4 and we now turn to a discussion of them.

1. Should a lawyer make clear to the client as soon as feasible what the fee arrangement between them is to be? We hold that he should and that preferably this clarification should take place at the outset of any discussion with the client, but in no circumstances should it be delayed beyond the initiation of any substantial efforts on behalf of the client.

EC 2-19, which is directly in point, states that "As soon as feasible after a lawyer has been employed, it is desirable that he [or she] reach a clear agreement with his [or her] client as to the basis of the fee charges to be made."

We believe that this is a basic and fundamental rule that should be followed by all lawyers. Misunderstanding about the amount of fees is one of the commonest complaints voiced by members of the public against the legal profession. Fear (justified or not) of high fees effectively prevents many people in need of competent legal advice from seeking it.

Full disclosure of all financial aspects of any professional or commercial transaction is one of the most basic tenets of our increasingly consumer-oriented society. By ensuring that people understand the extent of their financial responsibilities, which may often be less than the public fears them to be, the individual lawyer is furthering the directive of Canon 2 to "make legal counsel available." By providing such full disclosure, we "not only prevent later misunderstanding but ...also work for good relations between the lawyer and the client." (EC 2-19.)

2. Should the fee arrangement always be in writing and should it be reduced to writing at the outset of a relationship?

EC 2-19 states that "It is *usually* beneficial to reduce to writing the understanding of the parties regarding the fee." The reasons are obvious: written agreements provide a measure of certainty and reliability for all the parties and avoid subsequent disagreements as to the substance of the agreement. These are particularly important considerations in a lawyer-client relationship where the lawyer is often at an advantage because of his/her greater sophistication, articulateness, and knowledge of the client's confidential business.

While we believe that the principle just enunciated should control the vast majority of ordinary and usual lawyer-client relationships, we recognize that there may be some situations where it is not applicable. It is virtually impossible for this Committee to write a general opinion of this nature, without the benefit of a particular set of facts, that would cover every situation in which a lawyer might be justified in failing to give the client a written fee agreement. We have concluded that it is preferable to base such decisions on the facts of particular inquiries as they are presented.

However, it should be kept in mind, as we said in Opinion No. 4, that it is the attorney who "bears the responsibility for seeing that there is no likelihood of misunderstanding as to fee arrangements." Therefore, when there is a dispute or misunderstanding over a fee arrangement that has not been put in writing, the burden is always on the lawyer to justify the absence of a written agreement. In some situations, such as where the lawyer-client relationship has a long history and the client is sophisticated in dealing with lawyers and financial matters, there may be some practical reason justifying the failure to have a written agreement. Any final determination in an inquiry posed to this Committee must turn on an examination of all the surrounding circumstances, including the history of the relationship between that

[2]Certain of the conditions and limitations prescribed might be affected by adoption of the revision of Canon 2 recommended by the Committee to the Board of Governors and by the Board to the D.C. Court of Appeals.

[1]This opinion is based on the Code of Professional Responsibility as it now reads. A substantial revision of Canon 2 has been recommended by the Committee to the Board of Governors and by the Board to the D.C. Court of Appeals.

lawyer and client, the client's educational and employment history, the inherent ambiguity or complexity of the fee arrangement, and the reasons given for not putting the agreement in writing.

3. If the lawyer has failed to make clear at the outset what the fee arrangements will be, or to reduce the fee arrangement to writing if that is called for, may the lawyer nonetheless ethically charge some fee? We hold that the lawyer may.

Our response is dictated by principles of fairness to both parties to the lawyer-client relationship. Even though the lawyer may not have set forth clearly and as soon as feasible, in writing or orally, what the fee arrangements will be, that lawyer may still have provided services of real value to the client. We do not believe that the client should, in that circumstance, obtain legal services for free, without any compensation to the lawyer for services rendered.*

Thus, where the lawyer has in fact performed legal services for the client, the lawyer is entitled to be paid for the fair and reasonable value of those services to the extent that the client authorized them and the client understood that he or she would be charged for them. To state this general proposition, however, is to underscore once again the desirability of written fee agreements in order to avoid the disputes and misunderstandings that almost inevitably will accompany determination of the fair value of a lawyer's services.

December 1, 1976
Inquiry No. 28-A
Fee Arrangement

Opinion No. 26

Former Public Employees—Contract as "Matter" for Purpose of Disqualification Rule of **DR 9-101(B)**—Extent of Participation Required for "Substantial Responsibility" Within the Meaning of **DR 9-101(B)**

This opinion supplements the Committee's Opinion No. 16. See *District Lawyer,* Fall 1976, p. 43. We there considered the question of the extent to which an attorney, who was formerly the Assistant Director of the Office of Contract Administration of a governmental agency, was barred by DR 9-101(B) from undertaking representation of private clients in dealings and disputes with that agency.

DR 9-101(B) provides that a lawyer "shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." Reference should be made to Opinion No. 16 for the specific advice that was given and the facts upon which it was based.

To summarize that opinion briefly as a basis for the supplemental discussion that follows, we there indicated our interpretation of the word "matter" in DR 9-101(B) as broad enough to include contracts as such, not just particular claims and disputes arising under such contracts. We said that we did not believe that the mere fact that the inquiring attorney's office was "accountable" for a particular contract while he was with that office was enough to disqualify him. We said that he should be disqualified only if in fact he had substantial responsibility with regard to a particular contract. However, we said that we did not have sufficient information to enable us to determine whether, with respect to any particular contract, the attorney had the sort of responsibility that was "substantial" enough to disqualify him.

The attorney has now submitted a second inquiry, in which he furnishes additional information about his responsibility with respect to the contracts in question. He asks also that we reconsider our interpretation of the word "matter" in DR 9-101(B) as broad enough to include contracts and urges that we limit it instead to particular claims or disputes arising under such contracts.

The inquirer indicates that there are no confidential files, memoranda or internal agency discussions pertaining to the award and administration of the contracts that could in any way advantage him in later representation of private clients in claims or disputes arising under those contracts. He says that the only advantage he would have from his public employment would be his general knowledge of agency procedures and methods of resolving contract disputes. With the utilization of such knowledge, of course, we are not concerned. It constitutes no violation of DR 9-101(B).

Even so, there remains the question whether the attorney may have been in a position to benefit those whom he now seeks to represent by reason of substantial responsibility that he exercised while in his public employment. If he was, then the appearance of impropriety will still be present because the attorney will have been in a position to be influenced in his actions as a government lawyer toward those parties by the hope of later personal gain in private employment, rather than by the best interests of his public client.

DR 9-101(B), however, provides for disqualification only in the same "matter" in which the attorney exercised substantial responsibility while a public employee. Though the question is not free from doubt, we decline to change our interpretation of the word "matter" as broad enough to include a "contract." We have interpreted the word broadly to effectuate the general principle expressed in Canon 9 to "avoid even the appearance of professional impropriety." We believe that an attorney who has been in a position while in public employment where he could benefit a private party to a government contract as to which he had substantial responsibility should not accept employment with that private party pertaining to that same contract after leaving his public employment.

As noted in Opinion No. 16, our interpretation is consistent with the use of the word "matter" in 18 U.S.C. § 207. The word as used in that statute expressly includes "contract." The statutory prohibition is not directly applicable to the inquiring attorney because his former agency, though governmental and having offices located in the District of Columbia, is not an agency of the United States or of the District of Columbia. However, the statutory language does support our interpretation in a related context.

We have interpreted the disciplinary rule as it is written and in accordance with what we perceive to be its underlying purpose. We note, however, that the rule is not worded so as to effectuate in all instances its stated purpose. For instance, there may be an appearance of professional impropriety in *any* instance where a lawyer, soon after leaving public employment, accepts compensation for representation of a private client who was benefited by decisions or recommendations made by the lawyer in his public capacity. This is true quite apart from whether the decisions or recommendations were made in the same "matter" in which representation was later undertaken.

On the other hand, the passage of a considerable length of time tends to dispel the appearance of impropriety. The suspicion of possible abuse of office is much stronger where the attorney accepts employment soon after leaving public office from a client whom he benefited while in that office. The prohibition of 18 U.S.C. §207 against representation of a private client in a matter under the "official responsibility" of a government attorney extends for only one year after termination of the government employment. If the attorney "participated personally and substantially" in the matter while in government employment, however, the disqualification is continuing. DR 9-101(B) contains no limitation as to time in any circumstances.

This could have direct relevance to the inquiring attorney in the instant case, who has now been in private practice for more than a year. We have not taken the lapse of time into consideration in interpreting DR 9-101 (B), though he asks that we do so, because the rule does not make lapse of time a consideration.

Having declined to change our interpretation of the word "matter" in DR 9-101(B) we now proceed to the question whether the inquiring attorney exercised "substantial responsibility" within the meaning of DR 9-101(B). We think that he did. Although he

*We specifically exclude from this discussion the situation dealt with in Opinion No. 4, in which an attorney performs preliminary work prior to advising the prospective client that the case is not strong enough to pursue. We held that in the absence of an explicit understanding regarding fees, it would be improper for a fee to be charged, unless it was clear from all the surrounding circumstances that payment was or should have been contemplated by the client.

did not have decision-making authority with respect to he contracts in question, he played a significant role in the process leading to the contract award and was in a position to influence that decision by the degree of thoroughness with which he did his work.

The contracts in question were awarded through a process of formal advertisements and bidding. The low bid was in every case reviewed by a Survey Board of six to eight persons, whose task was limited to determining (1) whether the bid was "responsive" and (2) whether the bidder was "responsible." A bid was "responsive" if it met exactly the stated requirements in the invitation to bid. The bidder was "responsible" if he had adequate financial resources to insure performance as promised, if his existing business commitments were such that he could meet the performance schedule, if he had satisfactory records for performance and integrity, if he could comply with certain socio-economic provisions of the bid documents and if he had the necessary technical skills to perform the particular contract work. Those were the criteria under which the bids and bidders were scrutinized.

The Survey Board would develop a written report recommending approval of the low bid to a Contracting Officer, who would actually approve the bid. If the low bid was found not responsive, or the bidder was not responsible, the Board would make its report and recommendation for approval of the lowest bid that was found to be responsive by a bidder who was found to be responsible. Following approval of the award by the Contracting Officer, a summary memorandum would go to the Board of Directors of the agency, which made the actual award.

All documents and memoranda pertaining to the award of the contracts, except for proprietary financial data submitted by bidders, were available to members of the public upon request.

As to some contracts, apparently, the inquiring attorney had no responsibility and we do not address them in this opinion. We have already indicated in Opinion No. 16 that the mere fact that his office was "accountable" for the contracts was not, in our view, enough to disqualify him from later representing the private contracting parties. "Substantial responsibility" was required and, obviously, there could not be "substantial responsibility" where there was no responsibility.

As to some contracts, however, the inquiring attorney was assigned responsibility. Considering what he did, we think his responsibility was "substantial" within the meaning of DR 9-101(B).

He acted as investigator and recorder for the Survey Board, though he was not a member of that board. This meant that, individually or as a supervisor, he reviewed the information submitted by the low bidder, coordinated the review and approval of that information in various staff offices, particularly the offices of accounting and construction, obtained reports from outside sources as to the financial qualifications of the apparent low bidder, and made certain that the bid was mathematically correct. He then generally prepared a draft report for the signature of the members of the Survey Board, and he presented the report and his recommendations to the Board. If the report was approved, he signed it as "Recorder." The Director of the Office of Contract Administration was a member of the Survey Board and, in certain instances when he was absent, the inquiring attorney as his assistant was also required to sign the board report "for" the Director.

Considering the degree of involvement of the inquiring attorney in the process leading to the contract award and the potential for less than thorough investigation of the qualifications of a particular bidder, which might be of direct benefit to that bidder, we think that the attorney's responsibility must be regarded as "substantial" within the meaning of DR 9-101(B). The case is made a close one by the fact that he did not himself make the award decisions, the factual bases for the decisions were reduced to writing and available to the public, and a number of persons participated in reviewing the written submissions before the decisions were made. Nevertheless, we think the potential for abuse of office in favor of those who might later become clients was present, and hence there is the potential for the appearance of professional impropriety in a subsequent private representation. Accordingly, we believe that DR 9-101(B) disqualified the inquiring attorney from representing private clients in claims and disputes under government contracts as to which he had, as indicated in this opinion, participated in the process of contract award.

Inquiry No. 75-10-3
January 13, 1977

Opinion No. 27

DR 5-105, Multiple Employment; **DR 4-101**, Confidence and Secrets of Client

The inquirer requests an urgent opinion of the Committee in response to the following inquiry:

> Law firm, X, Y and Z, represents (and has represented over a period of a dozen years) Client A in continuous and active counseling, litigation, and administrative matters centered in, but not confined to the patent and trademark fields, including representation of A as a patent infringement defendant in several technologies, as a trademark and trade secret plaintiff, and in considering many proposed settlements. A's work has been done for the most part by X and Y, but Z has personally participated in one litigated matter.
>
> A new client, B, has brought X, Y & Z a patent infringement problem involving a specific technology with which X, Y & Z has not worked before. There are a number of potential infringers of B's patent, possibly including A. X, Y & Z have sued infringer M successfully on behalf of B. Z is in charge of this litigation but X and Y have been peripherally personally involved.
>
> Can firm X, Y & Z properly advise or represent B as plaintiff against A without A's consent?

The inquirer states that the law firm "represents" Client A in "continuous and active counseling." We infer from this that the law firm is actually representing A at the present time. Accordingly, its representation of B, who has an interest adverse to A, is clearly barred by the provisions of DR 5-105, which deal with the subject, "Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer." DR 5-105(A) provides that "[a] lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment...." DR 5-105(B) provides that "[a] lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client...." The fact that X and Y did the work for A while Z does the work for B is irrelevant since DR 5-105(D) provides: "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or her firm may accept or continue such employment."

Both paragraph (A) and paragraph (B) of DR 5-105 are subject to the exception set out in DR 5-105(C), which provides,

> "In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to such representation after full disclosure of the possible effect of such representation to the exercise of his independent professional judgment on behalf of each."

Thus the firm would have to get the consent of both A *and* B after a "full disclosure of the possible effect of such representation on the exercise of [the firm's] independent professional judgment on behalf of each."

The representation would also appear to be barred by the provisions of DR 4-101. That rule prohibits a lawyer from using, "a confidence or secret of his client to the disadvantage of the client," DR 4-101(B)(2), or to the advantage of a third person, DR 4-101 (B)(3). In view of the nature of the firm's representation of A as stated in the inquiry and in the absence of any further information, it is impossible to conclude that the firm's knowledge of A's business and technologies will not be of significance in coming to any judgment that A has infringed on B's patent. And this obligation to preserve the confidence and secrets of one's client continues even if the firm has completely terminated its relations with A. See EC 4-6.

Accordingly, we answer the inquiry as presented, "Can firm X, Y & Z properly ad-

vise or represent B as a plaintiff against A without A's consent?" in the negative.

Inquiry No. 77-2-2
January 13, 1977

Opinion No. 28

EC 2-30; DR 1-102(A)(4); DR 6-101; Representation of or Consultation with a Person Who Has Counsel; Giving Advice to a Person on the Adequacy of His Present Representation by Counsel

The inquiring organization is a non-profit, tax-exempt corporation which provides volunteer legal representation to persons in the equal rights area. It also maintains a list of referral lawyers to whom it refers people who are seeking legal assistance in this area but who do not fall within the scope of the criteria established by the organization's screening committee. The organization poses questions as to the proper procedure to be followed when its assistance is requested either directly or for a referral by a person who is already represented by counsel. According to the inquiring organization: "Sometimes the client doubts the advice given by counsel; other times they feel their attorneys are not acting in their best interests or in a timely manner."

The inquiring organization states its problem as follows: "It has been our policy in the past to ask such individuals whether or not they are represented by counsel, and if they are, we do not consider either organizational representation or referral to other lawyers. However, we question whether this policy deprives these individuals of the best possible counsel and is indeed a disservice to the public we are committed to assist. Therefore, we would appreciate some guidelines from [the Committee] as to whether we should consider organizational representation or referral to outside attorneys for those individuals wishing a consultation where those individuals have not (1) consulted their present attorney; (2) informed their present attorney; or (3) obtained the consent of their present attorney."

It appears to us that the inquiry raises two sets of issues. The first set concerns whether, and if so in what circumstances, the organization may itself undertake representation or consultation on the merits of the client's problem, or may refer the client to one of its referral lawyers for either of these purposes, when a lawyer already representing the client on the same matter has neither been informed nor consented to such representation or consultation, nor been discharged from his representation. The other set of issues relates to whether, in the same circumstances, the organization may properly consult with the client, or refer the client to a referral attorney for the purpose of consultation, with a view to making a recommendation as to whether the client should change attorneys.

For reasons set out below we conclude that consultation and advice are ethically permissible, though we suggest come cautions in this regard; but that active representation is not. And, while a lawyer ethically may—indeed, should—in appropriate circumstances give advice as to whether another lawyer's client should discharge that lawyer and retain new counsel, in such a case the lawyer giving such advice ordinarily should not himself thereafter undertake to represent the client and in no case should he undertake or provide such representation unless the client consents after full disclosure of the potential for self-interest in the giving of the original advice.

As to the first question—whether representation may be undertaken, or advice given, on a matter in which a client is already represented—the only provision of the Code of Professional Responsibility that seems to deal directly with the matter is EC 2-30, which reads in part as follows: "If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment." If this proposition were embodied in a Disciplinary Rule, our inquiry would need to go no farther; but it is not, and Ethical Considerations alone should not be given prohibitory application. Determination of what is and is not ethically permissible in the circumstances therefore requires a deeper analysis.

Such analysis can, we believe, usefully proceed from recognition that the "employment" of a lawyer, as that term is used in EC 2-30, might be taken to have reference to either of two quite different kinds of professional services: on the one hand, it might mean active representation of the client, involving contact on the client's behalf with third parties such as opposing counsel, a tribunal, or a governmental agency; or on the other it might mean no more than consultation and the provision of advice. As to the first, we believe there is an ethical barrier to dual employment; but as to the second, there is not.

Where a lawyer is already engaged in the active representation of a client, the entry of a second lawyer into such representation without the knowledge or withdrawal of the first would be fraught with peril to the client's interests by reason of the risk of inconsistent or even conflicting actions by the two lawyers involved. We note that the first sentence of EC 2-30 states that "employment should not be accepted by a lawyer when he is unable to render competent service," and in our view this proposition, which is reflected in DR 6-101, is the key: in such a dual but uncoordinated representation, a lawyer will not ordinarily be able to tender the competent service which is his ethical obligation. Thus we conclude that neither the inquiring organization nor a referral attorney could in the circumstances under consideration properly undertake representation of the client without prior knowledge, consent or withdrawal of the client's present lawyer.

The same consideration would not, however, necessarily apply to prevent a second lawyer from rendering only advice to the client who is already represented by another. In some circumstances, to be sure, the second lawyer would not be able to give competent advice on a matter without having the benefit of information that must be secured from the first lawyer; and in such circumstances DR 6-101 enjoins him from undertaking to furnish any. This will not always be the case, however—nor even so frequently as to warrant any flat ethical prohibition on dual representation. There may also be a temptation, in these circumstances, for the attorney who hopes to gain a new client to give advice, or to suggest that he will give favorable advice or provide effective representation, in order to induce clients to change representation. If there is any misrepresentation, explicit or otherwise, as a result, the consulting lawyer may run afoul of DR 1-102(A)(4). Again, this risk is surely not so great as to support a flat prohibition on consultation with or advice by a second lawyer. Moreover, there is a fundamental interest, recognized by Canon 2, in seeing to it that legal counsel is made available to those who are in need of it; and we believe that there is implicit in this precept the premise that one who needs legal assistance should be able not only to select counsel of his own choice, but also to change counsel or to consult additional counsel if he believes, whether rightly or wrongly, that his present counsel is not adequately serving his needs. We thus conclude that there is no general ethical barrier to the inquiring organization, or one of its referral attorney, consulting with or giving advice to the client who is already represented by another—although due regard must in each particular instance be had to whether enough information is available for competent advice to be given, and care must be taken that no misrepresentation occurs.

The second set of issues concerns whether, and if so in what circumstances, the organization, or an attorney to whom it refers a matter, may, in the circumstances under consideration, properly undertake to advise a person already represented by counsel as to whether he *should* change counsel. That decision may well be a momentous one for the client; and it may be of no small importance to the lawyer concerned as well. Hinging, as it is likely to do, on an appraisal of the quality of the representation already being furnished, it is a decision which calls for a judgment which is both delicately tuned and fully informed. It will not often be the case that a lawyer talking only to the discontented client of another lawyer, and having no independent access to the true facts of the situation, can form a responsible professional judgment as to whether the other lawyer is providing adequately competent representation. We are clear that where a

lawyer does not have available sufficient facts upon which to base professional advice on so weighty a matter, the lawyer is ethically bound to refrain from giving such advice.

This being said, we think it clear also that if the interests of the public for which lawyers have professional responsibility come into conflict with purely collegial considerations, the latter must yield; and it is among the highest (though also most difficult) professional obligations to pass judgment on the professional conduct of fellow lawyers where such a judgment is required and can be rendered.

Thus, our conclusion is that the inquiring organization could properly consult a client represented by another lawyer with a view to advising the client as to whether he should change lawyers, and by the same token could properly refer the client to a referral attorney for that purpose, even though the attorney then representing the client was not aware of and had not consented to the consultation.

It is also the view of the Committee that in the unusual circumstances where a lawyer does pass judgment—ex parte, as it were—upon the performance of a fellow lawyer, he or she should not then ordinarily agree to undertake the representation of the client concerned and in no case should he or she undertake to provide such representation unless the client consents after full disclosure of the potential for self-interest in the giving of the original advice. It is of the utmost importance that advice on so weighty a matter be disinterested. Disinterest can only be assured if the lawyer giving the advice does not thereafter benefit from it. Any other course, in this view, would lend itself too readily to abuse. In such a case, therefore, the ethical course ordinarily would be a referral to another lawyer whose lack of personal interest in the decision to change counsel would be beyond question. In the case of the inquiring organization, the consideration just mentioned would require that any such referral be made to an attorney other than one who is on the regular list of referral attorneys for the organization.

Inquiry No. 75-9-2
January 25, 1977

Opinion No. 29

EC 2-19—Change in Contingent Fee Arrangement in the Course of Representation

We are asked whether an attorney who had undertaken a representation for a specified contingent fee may, in the circumstances to be described, properly insist that the amount of the fee be increased.

The circumstances in which the question is asserted to arise must be stated in some detail. The representation concerns the client's claim for pay from a governmental agency of which he was formerly an employee. He had pursued the claim *pro se* before an administrative Board of Appeals where he won "on a technicality with the merits never having been considered." The defendant agency took appeal to an administrative Board of Review, which overturned the decision. The client then engaged the attorney to represent him in pursuit of the claim in the United States Court of Claims, where, it is stated, it was "fairly well understood" that one of three things would occur: the client would prevail, the client would lose, or there would be a remand to the administrative tribunals for determination of the merits of the case. A written retainer agreement was executed by the client and the attorney at this point, describing the representation as concerned with "action in U.S. Court of Claims for review of adverse [Board of Review] decision," and providing that the fee would be "25 percent of amount recovered—nothing if no recovery."

In the Court of Claims, a motion for summary judgment filed by the attorney on the client's behalf was denied and the matter was remanded to the administrative Board of Appeals for disposition on the merits. It is stated that that court's order required the filing of supplementary motions on the client's behalf, and in addition monthly progress reports from the attorney during the period of remand.

In the proceeding on remand in the Board of Appeals, the client, represented by the attorney, prevailed again; the defendant appealed to the Board of Review, which again overturned the lower board's decision; and the matter then returned once more to the Court of Claims. All documents having been filed in that court except the final replies by both sides, the attorney demanded that the contingent fee agreement be adjusted to change the amount of the fee from 25 percent to 40 percent of the recovery, contending that the return to the Court of Claims constituted a *second* appeal, which was beyond the scope of the original retainer agreement. The amount of the client's recovery, if there is one, is not fixed in amount, but continues to grow with each passing payday.

The questions posed by the inquirer concern the ethical propriety, in the circumstances stated, of the attorney's insisting upon an upward revision of his contingent fee arrangement. No question, is raised as to the propriety of a contingent fee arrangement in itself, *see* EC 2-20 and EC 5-7; nor are we asked for comment on the appropriateness of the particular levels of the fee involved.

There appear to be two issues. The first is whether the proceedings in the Court of Claims following remand are, on the facts as stated, beyond the scope of the original retainer, so as to justify a claim by the attorney for additional compensation in the event that the proceeding is successful. It goes without saying that if these proceedings are within the scope of the original retainer no additional fee can be claimed unless it is agreed to by the client. The second issue appears to be whether, if there is doubt about the scope of the retainer agreement, and its applicability to the final proceedings in the Court of Claims, that doubt is properly to be resolved in favor of the client or of the attorney.

As to the first of these questions, on the facts as stated, it seems fairly clear that the original retainer agreement does cover the entire proceedings in the Court of Claims. Even though these proceedings had two phases, with a remand and administrative proceedings sandwiched between them, such a remand is stated to have been specifically contemplated as a possible outcome of the initial efforts in that court. We note, moreover, that if the attorney's engagement was fulfilled upon completion of the first phase of the Court of Claims proceeding (that is, at the point where the remand had been ordered) there would have been no compensation due, for at that point there was no recovery from which a fee could be paid.

We recognize, of course, that there may be additional facts, not stated in the request for the Committee's views, which might warrant more uncertainty about the scope of the retainer than is indicated above. The second question posed is, accordingly, whether when there is uncertainty about the scope of a retainer agreement, doubts should as a general matter be resolved against the attorney or the client. We think the answer must be the former. EC 2-19 states in part that, "As soon as feasible after a lawyer has been employed, it is desirable that he reach a *clear agreement* with his client as to the basis of the fee charges to be made." (Emphasis added). In our Opinion No. 4, we stated our understanding of this Ethical Consideration as implying, *inter alia,* that "the attorney bears the responsibility for seeing that there is no likelihood of misunderstanding as to fee arrangements." *See also* Opinion No. 25. It follows of course that in the event there is a misunderstanding which results from a lack of clarity in the fee arrangements, the responsibility for its consequences should be borne by the attorney and not by the client. In the circumstances here stated, it would seem seriously unfair to the client to have the fee arrangement revised unilaterally at the very end of the representation, where the client would reasonably have believed the entire representation was covered by the arrangement.

Inquiry No. 76-10-31
January 25, 1977

Opinion No. 30

DR 2-103—DR 2-106—DR 5-105—DR 5-107—Legal Services to Union Members—Prepaid Legal Plan—Submission of Fee Schedule

The Committee has received two related inquiries dealing with proposals to offer legal services to members of labor unions. Compensation to the lawyers would be paid either by the unions or by the members of

the union pursuant to an established fee schedule. Since these proposals involve related questions under the Code, we deal with them in a single opinion.

The first inquiry relates to a prepaid legal plan. It states that a law firm desires to offer prepaid legal services in connection with a plan to be established by the union. It is proposed that the union and the firm agree to a contract under which the firm would provide legal services in specific areas to all members of the union in consideration for an annual fee to be paid by the union. The agreement would include a provision stating that the attorney-client privilege would exist between the law firm and the individual union members and that the union as an entity would not be entitled to any information concerning a member's confidential legal services. Also to be included in the agreement would be a provision stating that the law firm would not be able to represent any party in circumstances in which there would be or could be a conflict of interest vis-a-vis the union as an entity and its members.[1]

The second inquiry is somewhat different. It involves a request from a law firm's client, a labor union, that the firm submit a list of the fees that would be charged for legal services performed for the personal benefit of individual members. There is also a suggestion that the firm and the union enter into an agreement fixing those fee levels, even though the fees would be billed directly to each member involved.

We start by noting that the first inquiry involves what is in essence a prepaid plan for legal representation. The second inquiry, under either alternative, does not involve such a plan because the fees for the services to be rendered would be paid by the individual members receiving the services. The governing disciplinary rule is DR 2-103, dealing with recommendations of professional employment.[2]

DR 2-103 generally sets forth the existing restrictions upon a lawyer's use of lay intermediaries in offering his legal services to persons who are not presently clients. DR 2-103(C) states that a lawyer is generally forbidden to request a person or organization to recommend his employment. Paragraph (D) of the rule continues by adding a ban upon a lawyer's knowingly assisting a person or organization that recommends, furnishes or pays for the use of his professional services or the services of his partners or associates. However, DR 2-103(D) contains a number of exceptions. As promulgated by our Court of Appeals, the amended subparagraph (5) of paragraph (D), which differs from the Code as proposed by the American Bar Association, states that a lawyer may cooperate in a dignified manner with the legal service activities of, among other things, a bona fide, non-profit organization that, as an incident to its primary activities, furnishes, pays for, or recommends lawyers to its members. The subparagraph also provides that the organization must not derive a financial profit from the rendition of legal services by the lawyer and that the member for whom the legal services are rendered, and not the organization, must be recognized as the client in the matter. Whenever there is such a relationship between a lawyer and a qualifying organization of that type, it must be clear that the independent professional judgment of the lawyer is being exercised on behalf of the individual member as client, without interference or control by the organization.

Under each of the two inquiries, the obligation of independent professional responsibility toward the individual client member would be protected, because each inquiry states that the parties would explicitly recognize the existence of the attorney-client relationship between the firm and the individual member, and the firm would be precluded from entering into a representation that would involve a conflict of interest between the obligations it has to the member as client and to the union as the source of payment or recommendation. These explicit understandings would satisfy DR 5-107 and its related ethical considerations, particularly EC 5-21, 5-23, and 5-24. Stated in DR 5-107 is the rule that a person who recommends, employs, or pays a lawyer to render legal services for another is not permitted to direct or regulate the lawyer's professional judgment in rendering such services. It is obvious that, whenever a lawyer undertakes to represent a client, he owes that client undiluted loyalty, even if someone else suggested or is financing the representation. While it is easy to state the principle of independent and objective responsibility to the client rather than to the labor union, the lawyer must be sensitive to the possibility that the interests of an individual member of the union may not coincide with the objectives or policies of the union itself, or of union leaders or other members. In this situation the lawyer must recognize that, if he undertakes the representation of the member, he must do so without in any way tailoring his representation or his advocacy in order to maintain the favor of the union which pays or recommends him. In the case of the second inquiry, where it appears that the lawyer will represent the union as well as undertaking representation of individual union members, the lawyer must be prepared to observe the requirements of DR 5-105 concerning the representation of multiple clients.

Since we assume that the union is a not-for-profit organization and since there is to be no refund or commission to the union, there is no violation of the condition of DR 2-103(D)(5) that the organization not derive a financial profit from the firm's provision of the legal services. Moreover, under the facts provided to us, we see no difficulty under either of the inquiries with the condition in DR 2-103(D)(5) that the offering or promoting of the attorney's services by an organization must be "as an incident to its primary activities." We assume that the labor union involved in each instance is a bona fide organization established primarily for collective bargaining purposes and was not founded for the primary objective of providing legal services to its members.

Under the present Code it would be improper for a lawyer to approach a union either to offer to make available a fee schedule for circulation to union members or to propose the establishment of a prepaid legal plan. Under the facts stated in each of the two inquiries, however, the initiative has come from the unions themselves and we are satisfied that, in each instance, the provisions of DR 2-103(C) are satisfied.

Several cautions are in order in pursuing arrangements of the type discussed. Although the Code permits the quotation of a fee schedule to a labor union that requests it and permits the lawyer to agree with a labor union to provide services under an established fee schedule or as part of a prepaid plan, various ethical, disciplinary, and practical considerations dictate great care in establishment of any such arrangements. It is particularly important that the lawyer or firm considering quotation of a fee schedule in the abstract or the commitment to render described types of professional services for fixed amounts define with care the circumstances and conditions that may limit the services that will be covered and that may require an adjustment in the fee schedule. This kind of careful analysis will protect the lawyer's legitimate interest and also avoid unfairness to the prospective clients that might result either from a practical temptation to perform the services more hastily than appropriate or from the insolvency of the plan itself.

The requirements of DR 2-106, relating to the fees to be charged for legal services, clearly compel great care and forethought before a lawyer enters into arrangements of the type under discussion. That rule states that a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. An excessive fee is defined as one that, after a review of the facts, would be regarded by a lawyer of ordinary prudence as being in excess of a reasonable fee. The variety of factors enumerated in DR 2-106(B) as relevant to determining reasonableness confirms what any practicing lawyer knows: it is often extremely difficult

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[1]We assume that this provision is meant to control acceptance by the law firm of particular cases in which conflicts of interest are apparent at the outset of representation, and not to control the exercise by the firm of professional judgment in the course of representation.

[2]The Board of Governors of the Bar on November 10, 1976, petitioned the Court of Appeals to delete DR 2-103, *inter alia*, and to substitute new provisions that would allow advertising and solicitation, so long as they are not misleading or vexatious, and do not involve a violation of an intermediary of a valid law or professional or legal obligation.

to predict the proper fee for a particular legal representation. This uncertainty, even regarding matters of the same general type, indicates that a prudent lawyer who may be willing to enter into an agreement for a fixed-fee contract to render a variety of legal services to the members of a labor union, or to propose on a contractual basis the fees he will charge for particular kinds of matters will find it difficult to define precisely what a reasonable fee will be in all such circumstances.

For example, even the most common kinds of legal services, including drafting wills, handling divorce proceedings, and real estate closings, can involve widely disparate amounts, of time, complexity, and responsibility. On the one hand, EC 2-16 states that, in order for the legal profession to remain a viable force in fulfilling its role, a lawyer is entitled to receive adequate compensation for his services. At the other extreme, as DR 2-106(A) states, the lawyer may not collect an excessive fee. Before entering into any arrangement for a package of prepaid legal services or promulgating a general fee schedule, a lawyer should take adequate precautions to gauge the likely effect of the various factors that may influence the extent and value of the services he will be expected to render. This analysis is necessary if the lawyer is to avoid either rendering sharply discounted services throughout the course of the arrangement, and thus possibly jeopardizing his ability to discharge his professional commitments, or charging excessive fees to individual members calling upon him for representation.

February 22, 1977
76-2-12 and 76-7-24

Opinion No. 31

DR 7-106(C)(2); EC 7-10, 7-14, 7-25 — Lawyer for Congressional Committee—Summoning Witness Who It Is Known Will Decline To Answer Any Questions on a Claim of Privilege

We have been asked to advise whether it is proper for a congressional committee whose chairman, staff and several members are attorneys to require a witness who is a "target" of a pending grand jury investigation to appear at televised hearings to be questioned when the committee has been notified in advance that the witness will exercise his constitutional privilege not to answer any questions. At the outset, we note that whatever follows applies only to staff attorneys acting in their capacities as attorneys. It is not within our province to pass upon the propriety of conduct by congressmen, who may or may not be lawyers, but are acting in any event as congressmen.

It is not per se improper for an attorney acting as counsel for a congressional committee to cause a witness to be summoned in furtherance of a legitimate legislative function of Congress, even though the resultant attending publicity will be damaging to the witness' reputation and possibly prejudicial to him in a future criminal trial. On the other hand the inquiring power of a congressional committee is limited to obtaining information in aid of Congress' legislative function. *McGrain* v. *Daugherty*, 273 U.S. 135 (1929); *Sinclair* v. *United States*, 279 U.S. 263 (1929). There is no congressional power to expose for the sake of exposure. "Investigations conducted solely for the personal aggrandizement of the investigator or to 'punish' those investigated are indefensible." *Watkins* v. *United States*, 354 U.S. 178, 187, 200 (1957). See also EC 7-16, which states that "The primary business of a legislative body is to enact laws rather than to adjudicate controversies."

Since the only legitimate function of a congressional investigating committee is to obtain information for the use of Congress in its legislative capacity, the inquiry before us poses the issue whether it is ethical to summon a witness when it is known in advance that no information will be obtained and the sole effect of the summons will be to pillory the witness. In dealing with an analogous situation, the American Bar Association Project on Standards for Criminal Justice stated (par. 5.7(c)) that "It is unprofessional conduct for a prosecutor to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege."[1] The courts have held that summoning a witness in such circumstances constitutes prosecutorial misconduct that may require a reversal of a criminal conviction. *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973); *San Fratello* v. *United States*, 340 F.2d 560 (5th Cir. 1965); *United States* v. *Tucker*, 267 F.2d 212, 215, (3rd Cir. 1959). And in the case of a grand jury, the American Bar Standards provide (par. 3.6(e)) that "The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to the law."[2]

We see no reason in principle why this standard should not govern the conduct of an attorney acting for a congressional committee. Insofar as the attorney has some question whether the witness will in fact claim his privilege if called, this question can be resolved by calling the witness in an executive session. There is certainly no need to have the test of claim of privilege take place in a televised open hearing with the resultant inevitable prejudicial publicity for the witness. Cf. *San Fratello* v. *United States*, *supra* at 565, where the court stated that, if the government insisted in a criminal trial that the claim of privilege be made on the witness stand under oath, this should be done out of the presence of the jury.

Although it appears clear that the conduct described in the inquiry is improper, our jurisdiction is confined to rendering opinions on the applicability of the Code of Professional Responsibility to the conduct in question. Not surprisingly, the Code is directed to the conduct of attorneys in its usual manifestations and is not specifically oriented to the conduct of attorneys acting as counsel for congressional committees. Nonetheless, in our view, the conduct described here appears to be in conflict with at the least the spirit of one Disciplinary Rule and the language of several Ethical Considerations. DR 7-106(C)(2) dealing with a lawyer's trial conduct provides: "In appearing in his professional capacity before a tribunal, a lawyer shall not . . . [a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness. . . ." Although, arguably, a congressional committee is not a "tribunal," we believe that the principle that an attorney should not ask a witness questions that are "intended to degrade" him is applicable here. DR 7-106(C)(2) prohibits only questions that the lawyer has no reasonable basis to believe are relevant and that are "intended to degrade" as well. When the lawyer knows in advance that he will not receive an answer to his question because of a claim of constitutional privilege, we believe that the question is fairly characterized as irrelevant to the case and such irrelevance is to the lawyer's knowledge.

Further, we believe that the conduct conflicts with the following ethical considerations: EC 7-10 ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm"); EC 7-14 ("A government lawyer . . . should not use his position . . . to harass parties"); and EC 7-25 ("[A] lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him").[3]

March 29, 1977
Inq. No. 21

[1] A committee of the District of Columbia Judicial Conference in a report entitled Comparative Analysis of American Bar Association Standards for Criminal Justice with District of Columbia Law, Rules and Legal Practice (September 1973) commented (pp. 55-56) that the District of Columbia is in accord with this Standard.

[2] The Report cited *supra*, fn. 1, stated (pp. 42-43) that the Committee was divided regarding the applicability of this standard in the District of Columbia.

[3] The conduct might also be taken to violate DR 1-102(A)(5), which provides that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice." The Judicial Conference Committee (*supra* note 1) expressed that view at p. 56 of its report. However, a majority of this Committee are of the view that the language of this standard is too vague to permit its application as a disciplinary rule.

Opinion No. 32

DR 1-102(A)(4)—Use by Prosecutor's Office of a "Notice of Witness Conference" as a Means of Inviting Third Party Witness Not Under Compulsory Process to Conferences in Preparation for Trial

We are asked about the ethical propriety of a notice which is routinely used by a local prosecutor's office for the purpose of securing attendance by witnesses at conferences with lawyers in the prosecutor's office in preparation for trials.

The notice in question is a typewritten form, reproduced on the letterhead of the prosecutor's office. It bears the block letter title "NOTICE OF WITNESS CONFERENCE," the designation of addressee "TO: [name and address];" and then the less formal salutation "Dear [name of addressee]," followed by this text:

> This is a notice for your appearance as a witness at the [prosecutor's] office, at [address] on _____ at _____ to assist in the preparation for trial of the case of [case name].
>
> You may contact and confer with the Assistant [Prosecutors] in charge of this case if you have not already done so by telephoning the number below:

There follow the name of the assistant prosecutor, a room number and a telephone number. Finally, there is a note at the bottom of the Notice which reads as follows:

> NOTE: Please be on time for this appointment. Tardiness only prolongs the length of the witness conference and inconveniences the other witnesses. You are also reminded that you will be financially compensated for your appearance (unless you are a Government employee appearing during your regular working hours).

Two questions appear to be posed by the inquiry. The first is whether the form of this notice is such as to be misleading to a lay recipient, by suggesting that s/he is under some legal compulsion to attend the witness conference—there being in fact no such legal compulsion entailed by the notice. The second question is whether, if the form of notice is misleading in this fashion, it poses an ethical problem under the Code of Professional Responsibility.

It will be useful, by way of background for the discussion that follows, to discuss briefly one of the ABA's Standards for Criminal Justice, and the prior consideration, by a quite different Committee than this one, of whether the notice in question measures up to that Standard.

Standard 3.1(d) of the Standards Relating to the Prosecution Function, as approved by the ABA House of Delegates, provides:

> (d) It is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless he is authorized by law to do so.

The commentary following this Standard, under paragraph d., reads in full as follows:

> d. Use of colorable judicial process
>
> The Advisory Committee has noted the practice of some prosecution offices of summoning persons for interviews by means of documents which in format and language resemble official judicial subpoenas or similar judicial process, although the prosecutor lacks subpoena power. Such practices are improper; they amount to a subversion and usurpation of judicial power. Absent specific statutory subpoena power, a prosecutor's communication requesting a person to appear for an interview should be couched in terms of a request; it should not simulate a process or summons which the prosecutor does not have power to issue.

The ABA's Standards for Criminal Justice were considered by a committee of the District of Columbia Judicial Conference in a report entitled Comparative Analysis of American Bar Association Standards for Criminal Justice With District of Columbia Law, Rules and Legal Practice (September 1973). As respects Standard 3.1(d), quoted above, that Committee's comments, which appear at page 37 of the report, make specific reference to the Notice here under consideration, and may usefully be quoted in full:

> The Committee recommends the adoption of the Standard; however, the Committee was divided as to whether the form currently sent to prospective witnesses by the prosecutor complies with the Standard.
>
> Those in favor of the present form note that it carries no seal of court, is on United States Attorney stationery rather than court stationery, and is mailed to prospective witnesses rather than delivered by a United States Marshal. For these reasons, proponents of current practice believe that it does not have the appearance of a subpoena or other judicial process.
>
> Further, the proponents believe that it is important to impress upon people the responsibility to come forward with information that may have a bearing upon a violation of the law. They believe that the present form is a strong statement of that responsibility but within the limits prescribed by the Standard. Therefore, they not only endorse its use by the prosecutor but encourage that defense lawyers adopt a similar form to urge prospective witnesses to provide information to counsel for the accused.
>
> Opponents of the present form believe that it violates the Standard in that it is phrased not in terms of a request to come forward as suggested in the A.B.A. Advisory Committee Comments to the Standard, but it misleads recipients into believing that the "Notice to Appear" carries possible sanctions for failure to do so. While opponents of the present form agree that all persons with knowledge of events concerning a violation of the law have a responsibility to come forth and should be urged to do so, they nonetheless reject any suggestions of coercion which they believe exist in the present form. The opponents believe that any communique to prospective witnesses should be written in letter form requesting the appearance of the witness, and clearly noting that attendance is voluntary, and not required by law.

In connection with the instant inquiry, the prosecutor's office made a submission to the Committee which called attention to these comments of the Judicial Conference Committee, and essentially repeated the arguments in favor of the Notice which are recited in the passage just quoted.

This Committee does not view its proper role to be the resolution of questions regarding the application of the ABA's Standards for Criminal Justice—particularly when a more authoritative and expert committee has found itself divided on such a question, as was the case here.[1] On the other hand, it appears to us that the issue posed with respect to the propriety of the Notice here under discussion may well be a somewhat different one under the Code of Professional Responsibility than it is under the ABA Standards for Criminal Justice, even though the two are of course related.

Thus, the essence of Standard 3.1(d) is (quoted above) is that the prosecutor must avoid the use of communications which have "the appearance or color of a subpoena or similar judicial process": and the point is cogently made that the Notice here under discussion does not bear any of the marks of a subpoena or other judicial process—at least to an informed and expert eye. Thus it may reasonably be thought that the notice does not fall afoul of this Standard. Yet a communication that is not condemned by such an explicit Standard might nonetheless be so framed as to be misleading to a lay recipient, who must be assumed to be unfamiliar with the forms of subpoenas and other judicial process, and may further be presumed to be unaware that the prosecutor's office has no legal authority to compel the attendance of witnesses at conferences in his office. This particular Notice, we think, is misleading in this sense: it is so phrased as to suggest, even though it does not explicitly state, that some legal compulsion is involved; that it is a summons, not a request; and that a failure to abide by the request could lead to the imposition of legal sanctions. Indeed, as the comments of the Judicial Conference Committee (quoted above) made clear, proponents of the use of the Notice believed that it is "important to impress upon people the responsibility to come forward with information that may have," and that the Notice is a "strong statement of that responsibility": in effect, an acknowledgement of the fact that the form is designed to convey the impression that a legally enforceable obligation of attendance is involved.

To conclude as we do that the Notice in question is likely to be misleading to a lay

[1] Although the Judicial Conference Committee was divided as to whether or not the Notice was in conflict with Standard 3.1(d), a majority of this Committee believes that it is in conflict with that Standard.

recipient does not, however, end our inquiry: the question remains whether by reason of its being misleading it falls afoul of any ethical prohibition.

The prohibition which appears to be applicable is found in subparagraph (4) of DR 1-102(A), which reads in its entirety as follows:

> (A) A lawyer shall not:
> (1) Violate a Displinary Rule.
> (2) Circumvent a Displinary Rule through actions of another.
> (3) Engage in illegal conduct involving moral turpitude that adversely reflects on his fitness to practice law.
> (4) *Engage in conduct involving* dishonesty, fraud, deceit, or *misrepresentation.*
> (5) Engage in conduct that is prejudicial to the administration of justice. (Emphasis added.)

The critical question is whether the word "misrepresentation" should be read as applying to a communication which is misleading in the sense we find this Notice to be.

In addressing this question, we appear to be writing upon a clean slate. We have found no published opinion of any ethics committee interpreting or applying the term "misleading," as it appears in DR 1-102(A)(4); and the term did not appear in the Canons of Professional Ethics. The predecessor provision to this Disciplinary Rule was Canon 15, which asserted, *inter alia*, that

> the office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane.

This provision appears to have been found to be transgressed only in cases involving markedly more deceptive and reprehensible conduct than that here in issue. See ABA Formal Opinion 21, ABA Formal Opinion 178. But, of course, "misrepresentation" is something different from, and less than, "fraud" or "chicane": thus these decisions offer little guidance to the present decision. Nor is there any legislative history of the Code of Professional Ethics, to indicate whether the authors intended that the term "misrepresentation" be read strictly or broadly: that is, as requiring an explicit or affirmative misstatement of fact or law, on the one hand, or on the other as applying to any statement or omission to state whose effect is likely to be mislead a reader or listener.

Without reaching the question of a general approach to be taken to the application of DR 1-102(A)(4), however, the Committee has little difficulty in concluding that it should apply to the Notice here in question. We have no doubt that the notice tends to mislead the public, and is indeed phrased with a purpose of doing so. It therefore involves a "misrepresentation" within the meaning of DR 1-102(A)(4). In so holding, we do not disagree with the view, expressed in the comments of both factions of the Judicial Conference Committee (quoted above), that there is a civic responsibility on all persons to come forward with information that may have a bearing on violations of the law. It is certainly desirable that witnesses cooperate both with prosecutors and with other attorneys. However, it does not follow that it is ethically permissible to induce that cooperation by implying, as we believe the Notice under consideration does, that the citizen's responsibility is legally enforceable in circumstances where it is not.

March 29, 1977
Inquiry No. 76-6-23

Opinion No. 33

DR 2-101(B)(3)—Inclusion of Firm Name in Lawyer's Listing as Member of Advisory Board of Civic Organizations

We are asked whether an attorney who is a member of an advisory board to a civic organization may include the firm name on a listing of board members in a bi-weekly organization publication of general circulation.

The advisory board is composed of lawyers and non-lawyers who represent the different geographic regions served by this national level civic organization. The non-lawyers list themselves by name, title, organization, and geographic location. The lawyers differ as to their method of listing: some identify themselves as attorneys with firm name and geographic location, while a couple omit the firm name.

DR 2-101(B)(3) "does not prohibit limited and dignified identification of a lawyer as well as by name . . . [i]n routine reports and announcements of a bona fide . . . civic . . . organization in which he serves as director or officer."

ABA Opinion 290 (1956), construing old Canon 27, states that "[t]he question is always . . . whether under the circumstances the furtherance of the professional employment of the lawyer is the primary purpose of the advertisement, or is merely a necessary incident of a proper and legitimate objective of the client which does not have the effect of unduly advertising him."

The listing of the board member/attorney "as a lawyer as well as by name" in the publication in question is allowed by DR 2-101(B)(3). Since the organization has a national audience, identification of the geographic location of each board member informs the reader that the organization represents a broadly representative body of professional opinion, thereby fulfilling "a proper and legitimate objective of the client" without "unduly advertising" the attorneys in conformity with ABA Opinion 290.

However, the use of the firm name is not permitted under DR 2-101(B)(3). Nor can any argument be made that inclusion of the firm name fills "a proper and legitimate objective" of the civic organization under ABA Opinion 290, since lawyers have included or excluded the firm name at their own discretion. Indeed, had all the attorneys listed their firm names, strong evidence of "a proper and legitimate objective of the client" would be required to offset the concern for "unduly advertising" the attorneys. In the present situation, the firm name should not be included."*

Dissenting Opinion of One Member

The general rule of DR 2-101(B) is that "[a] lawyer shall not publicize himself, his partner, or associate" in various ways. DR 2-101(B)(3) says that this general rule "does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name . . . [i]n routine reports and announcements of a bona fide business, civic, professional or political organization in which he serves as director or officer." Naming the firm of which he is a member or with which he is associated is one of the ways in which a lawyer typically identifies himself as a lawyer. I find nothing in DR 2-101(B)(3) that singles out this method of identification for disapproval. Opinion 290, cited in the majority opinion, though decided under the old Canons may have some special force because it is quoted in a footnote to the phrase that introduces subparagraph (3) of DR 2-101(B). But the passage that is quoted both in the footnote and in the majority opinion seems merely to state a question, not to answer it. The subject of Opinion 290, I should add, was the naming of a law firm as vouching for municipal bonds in an advertisement for such bonds. The naming was approved. In Informal Opinion No. 645, also under the old Canons, the ABA Committee said that, where in a list of directors of a bank all of whose principal business connections or occupations were stated one of the directors was listed as an attorney "or the name of the law firm [was] shown," old Canon 27 was not violated.

The majority opinion notes that this Committee's proposed wholesale revision of Canon 2 has gone forward to the Court of Appeals with the endorsement of the Board of Governors. The pendency of that reform proposal does not justify us in reading into the present Canon 2 proscriptions and distinctions even pettier than those that are required by its terms.

March 29, 1977
Inq. No. 76-3-16

Opinion No. 34

DR 2-102(B)—DR 2-102(D)—Multi-Jurisdiction Law Firms with Offices in the District of Columbia; Permissible Firm Names When Not All Named Partners Are Admitted to Practice in the District of Columbia

We are asked for an opinion on the ethical permissibility of an out-of-town law firm having an office in the District of Columbia under a firm name that includes the names

*This opinion is now obsolete because of amendments to Canon 2.

of partners who are not admitted to practice in the District of Columbia. For reasons to be explained, it is the Committee's view that there is no prohibition in the Code of Professional Ethics against the use of such a firm name in the District of Columbia, although there are applicable requirements regarding the manner in which individual lawyers in the firm are listed, on letterheads and elsewhere. It is also required, of course, that all lawyers of the firm actually engaged in the practice of law in the District of Columbia be individually admitted to practice here.

The particular circumstances giving rise to the inquiry are as follows. The inquirer has been a member of the Pennsylvania bar since 1964 but has lived in the Washington, D.C., area since 1968 and intends to continue residing here. He proposed at the time of the inquiry to become a partner in a law firm based in Pennsylvania; simultaneously, the firm would open an office in the District of Columbia, under a modified firm name that would include the inquirer's name along with those of other partners, some of whom were members of the District of Columbia Bar and others not. The version of the firm name that included his name would be used only in connection with the firm's District of Columbia office; other variants of the firm name, in each case including the name of one or more resident partners, are used by the firm's branch offices in other states. The inquirer intended to apply for admission to the District of Columbia Bar and expected to be admitted to the Bar within a matter of months. The specific question posed by the inquiry was whether use of the inquirer's name in the firm name during the relatively brief period when his application for admission was pending would be ethically permissible. The inquirer recognized that until he was admitted to the Bar here he could not practice before the local courts.

We think that the particular circumstances in which the inquiry arose, and the particular question asked by the inquirer, may obscure the larger questions involved, by focusing attention upon the status of the inquirer and upon the relatively brief interim period before the inquirer would, after application, be admitted to the Bar. Neither the brevity nor the transitional nature of that period has any real bearing upon the issues posed. If the course of action proposed by the inquirer was otherwise ethically improper, of course, it would not have been saved from impropriety by its relative brevity of duration. Nor does the change in the inquirer's own situation, by reason of his admission to the Bar—which presumably has occurred in the lapse of time between his submission of the inquiry and the Committee's issuance of this opinion—affect the fundamental issue presented, for even after the inquirer is admitted here the firm name will include the names of some partners outside the District of Columbia who are not so admitted. That fundamental issue, which is of potentially quite broad impact, is whether, and if so under what circumstances, a law firm which has offices in other jurisdictions as well as in the District of Columbia may ethically use, in connection with the latter office, a firm name that includes the names of partners of the firm who are not admitted to the bar here.

The answer, we believe, is to be found in the text of DR 2-102(D), which reads in its entirety as follows:

> "A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; *however, the same firm name may be used in each jurisdiction.*" (Emphasis added.)

The first clause of this Disciplinary Rule clearly prescribes that in the circumstances under discussion any listings of the firm's lawyers on its letterhead or elsewhere must make clear which lawyers are not licensed to practice in which jurisdictions where the firm has offices. The second clause, however, almost equally clearly provides that, if this condition is met, the firm may ethically use in all of these jurisdictions a name that contains the names of partners who are not licensed in all of the jurisdictions. The language of this clause might perhaps be more explicit than it is, yet it is difficult to see how it could have any other meaning. In any event, this reading of the text of DR 2-102(D) is confirmed by consideration of its historical background.

The pertinent history is recited at some length in ABA Formal Opinion 318, which applied the predecessor of DR 2-102(D), Canon 33 of the former Canons of Professional Ethics, to essentially the question here under consideration. A brief recapitulation of that history should here suffice.

Canon 33 as originally adopted contained, among others, the following two sentences that are pertinent to the present discussion:

> "Where partnerships are formed and permitted between lawyers who are not all admitted to practice in the local courts, care should also be taken to avoid any misleading name or representation which would create a false impression as to the professional position or privileges of the member not locally admitted. . . . *In the selection and use of a firm name, one not admitted to practice in the local courts should not be named, lest use of his name should mislead as to his professional position or privilege.*" (Emphasis added.)

The second of these two sentences, underscored in the quotation above, of course unequivocally prohibited the practice here under discussion.

In 1937, Canon 33 was substantially amended, with the result that the two sentences quoted above were revised to read as follows:

> "Where partnerships are formed between lawyers who are not all admitted to practice in the courts of the state, care should be taken to avoid any misleading name or representation which would create a false impression as to the professional position or privileges of the member not locally admitted. . . . In the selection and use of a firm name, no false, misleading, assumed or trade name should be used."

Although this textual change clearly omitted the explicit prohibition of the use in a firm name of the name of a partner not admitted in the jurisdiction, the revised Canon 33 continued by the weight of authority to be interpreted as if this textual change had not occurred. Thus Drinker's authoritative *Legal Ethics* (1953) asserted as an apparently invariable rule that "the firm name should not include that of a living person not admitted in the jurisdiction" (p. 207), and explained:

> "The partnership name may not include that of one not locally admitted, despite explanatory statements on the letterhead, shingle, etc. since the name, used where no such explanation accompanied it, would imply that all the named partners were locally admitted." (p. 205)

Despite this seemingly categorical authority, some exceptions developed to the general rule so stated. Three such exceptions were recited in the following paragraph in ABA Formal Opinion 318, which also sets out that Opinion's holding on the present issue:

> "It would be improper to maintain an office in a state under a partnership name which includes the names of partners not licensed to practice in that state, unless [1] such practice is condoned by local custom and usage in the state where the office is to be maintained. This prohibition does not apply to [2] firms engaged exclusively in the practice of one of the specialized services recognized by Canon 27 or to [3] firms maintaining a branch office in Washington, D.C., except in states where such a practice is prohibited by statute. In those exceptional cases, care should be taken to see that the letterheads, listings and all other representations of the firm name to the public make it clear which members of the firm are licensed to practice only in Washington, or wherever the branch office may be located."

The first and third of the exceptions designated by the bracketed numbers in this passage might be arguably applicable to the situation here under consideration. But the decisional authority underlying the reference to "firms maintaining a branch office in Washington, D.C." did not concern the propriety of the use in Washington by a firm with a branch office here of a firm name including lawyers not admitted to practice here, but rather the reverse of that situation: namely, the use in the firm's home jurisdiction of a name that included the name of its Washington partner. See ABA Formal Opinion 256. The only published interpretation of Canon 33's applicability to the Washington end of such a situation appears to have been a memorandum of the Unauthorized Practice of Law Committee of the Bar Association of

the District of Columbia, the largest of the District's voluntary bar associations, which was approved by the Board of Directors of that association in 1965. See D.C. Bar Journal, July 1965, at 259. That memorandum took the position that no out-of-town firm could practice law in Washington (with exceptions not here relevant) if its name included the name of any lawyer, living or dead, who had not been admitted to the bar here. The same memorandum also made clear that there was not at that time any local custom or usage—at least none recognized by the Unauthorized Practice of Law Association—that might have brought the practice within the first of the exceptions referred to in the paragraph from ABA Formal Opinion 318 quoted above.

The ABA Committee that considered Formal Opinion 318 was divided on the question whether Canon 33 should be more broadly interpreted, but, as the Opinion noted,

> "A majority of the Committee feel that if Canon 33 is to be further liberalized, such liberalization must be by amendment to the Canon and not by interpretive opinion."

It is apparent to this Committee that the liberalization of the ethical rule thus invited by the ABA Committee was in fact accomplished in the preparation of the new Code of Professional Ethics. The second clause of DR 2-102(D), providing, with respect to a multi-jurisdiction partnership not all of whose partners are licensed in all jurisdictions, that "the same firm may be used in each jurisdiction," is new language that had no predecessor or analogy in the old Canon 33. Although there is not, unfortunately, an explicit legislative history, the inference seems inescapable that this change in language was intended to accomplish precisely the liberalization invited by Formal Opinion 318.

We therefore conclude that in the circumstances giving rise to the present inquiry there would be not ethical bar to the inquirer's law firm using, in the District of Columbia, a firm name that includes—or, for that matter, consists entirely of—names of partners of the firm not admitted to practice here. Whether or not the firm name included the names of local practitioners, of course, those lawyers of the firm who practice law in the District of Columbia office must be duly admitted to practice; and in addition the requirements of the first clause of DR 2-102(D) must be met; that is, all "enumerations" of the members and associates of the firm on its letterhead and other permissible listings must make clear the pertinent jurisdictional limitations.

Because of a quirk in the factual circumstances on which the present inquiry is based, a question might be raised as to whether the general rule we have announced would be applicable to the particular firm here involved. As has been mentioned, that firm's name varies somewhat from jurisdiction to jurisdiction, so as to include the name of the local partner or partners and to include as well some—but not all—of the partners whose names are included in the firm name in its base jurisdiction. The second clause of DR 2-102(D), it may be observed, says that "the same firm name may be used in each jurisdiction"; and this might be read to mean that the firm name used must be identical in each jurisdiction. We think this provision should not be so read. The verb used is the permissive "may," not the mandatory "must." While the placement and phrasing of this clause are such as to lend some color to a view that it is an exception to a general principle (of avoid misleading names), and so to be narrowly construed as applying only to the specific situation mentioned, we see no reason why the use of different firm names in different jurisdictions would have any greater capacity to mislead than use of the same name in all jurisdictions. A sufficient explanation for the provision's reference to use of the same name would seem to be that the particular situation referred to is the commonest one: in other words, the reference is illustrative, not definitional.

A final word may be appropriate regarding the use of names of deceased partners. The inquiry to which we have here responded involves a firm in which one of the named partners is deceased. It is clear to us that this fact makes no difference as respects the applicability of the general rule we have described above. The reality is, of course, that many firm names include the names of deceased partners of the firm or of a predecessor firm. The only reason for even mentioning the point here is that the Memorandum of the Unauthorized Practice of Law Committee, referred to above, took the view that the use of names of deceased partners was not permissible in connection with a branch office in the District of Columbia, if those partners when living were not members of this bar, on the ground that such use would mislead as to what their status had been. We find that Committee's reasoning unpersuasive, however. We note, further, that even Canon 33 was early interpreted to make an exception to its general prohibitions for the use of names of deceased partners. See ABA Formal Opinion 6. We note as well that DR 2-102(B) excepts the use of deceased partners' names from any implication of misleadingness.

March 29, 1977
Inq. No. 76-9-28

Opinion No. 35

DR 2-108(B)—Restriction of the Right to Practice Law—Settlement Agreement

An inquirer puts to the Committee the following question:

> "DR 2-108(B) provides: 'In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.' May an attorney in connection with a settlement of a civil action agree that he will not sue the defendant ever again with respect to any matter? In other words, may an attorney in connection with a settlement agree that he will not represent anyone who has a claim against the defendant in the matter being settled?"

In addition, the inquirer requests an opinion on a related question:

> "[W]hether an attorney may in connection with the settlement of a civil action, enter into an agreement that he will not refer a potential client to another attorney if that potential client has a claim against the defendant involved in the settlement."

In connection with the inquirer's first question, it would appear that DR 2-108(B) clearly precludes the type of provision of a settlement agreement contemplated by the question. The words are unambiguous: in connection with the settlement of a controversy or suit a lawyer may not make an agreement that restricts his right to practice law. An agreement by the lawyer that he will not represent anyone who has a claim against the settling defendant is clearly a restriction of the lawyer's right to practice law.

Several Ethical Considerations bear upon the matter.

> EC 2-1, which deals with the need of the public for legal services, states that this need cannot be met unless the public is able to obtain the services of acceptable legal counsel. While the lawyer who has submitted the inquiry is presumably not so uniquely qualified as to be the *only* lawyer capable of providing acceptable legal services, a settlement that foreclosed him or her from providing services in certain matters would be contrary to the general intent of EC 2-1.
>
> EC 2-7 speaks to the lawyer selection process, pointing out that the law has become increasingly complex and specialized and that many laymen have difficulty in determining the competence of lawyers to render different types of legal services. In the matter in question, the inquirer has presumably demonstrated a competence in connection with the matter being settled that may cause a potential client with a similar claim against the defendant, or even a quite different, unrelated, claim to believe that the lawyer may be competent to represent him. Having so identified a lawyer whose counsel he may wish to obtain, the potential client would be denied the services of the lawyer so identified if the lawyer entered into an agreement with the defendant to deny his or her counsel to the individual who sought it.

Why would a defendant attempt to restrict a lawyer in connection with settlement of the civil action? We cannot answer this question on the basis of the limited information

provided in the inquiry, but it may nevertheless be relevant to our consideration of the matter. For example, EC 2-30 states that employment should not be accepted by a lawyer when "it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another." In the absence of any information in the inquiry suggesting that retention of the lawyer's services would be to harass or maliciously injure the defendant, there appears to be no basis for concluding that the lawyer must agree to withhold his subsequent services for this reason.

The lawyer, of course, is not obliged to accept all employment offered to him. EC 2-26 states that "a lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client; but in furtherance of the objectives of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment." But the question here is whether a lawyer may ethically foreclose himself in advance from employment as part of a settlement with a defendant in a civil action. Once again, from the information provided, there appears to be no basis in the Ethical Considerations that would support such an agreement to restrict the lawyer's subsequent services in connection with the settlement of the current action.

A review of ABA opinions has disclosed only one in which DR 2-108(B) is specifically cited. This is Informal Opinion 1301 dated March 25, 1975, dealing with employment agreements with non-lawyers restricting a corporate lawyer's post-termination employment. Since the agreement in question did not pertain to the settlement of a controversy or suit, the inquirer did not believe that DR 2-108(B) applied, and the opinion that was issued did not dispute this.

An informal opinion of the ABA Committee on Ethics and Professional Responsibility under the old Canons is squarely in point. This is Informal Opinion 1039 dated May 29, 1968, entitled: "Can a Lawyer Ethically Sign an Agreement which Settles His Client's Litigation When the Settlement Agreement Contains a Covenant that He Will Not Represent Other Plaintiffs Against the Defendant." The inquiry was posed by a lawyer whose practice included the representation of plaintiffs in private antitrust actions. Although there was no canon that clearly covered the matter—unlike the present situation in which DR 2-108(B) is a part of the Code—the opinion answered the lawyer's question in the negative. The ABA Committee said:

> "The covenant you refer to . . . imposes an undue restriction upon the plaintiffs' attorney and also affects the right of the client to obtain the benefit of the services to which he is entitled from his own lawyer. Because of the foregoing it is improper for the attorney representing the defendants to demand this kind of a covenant and by way of corollary it is improper for plaintiff's attorney to abandon the interests of other clients, who have depended upon his services through periods that may be invaluable and of long standing. This same situation could apply to many other fields of law which require some specialization including compensation cases, products liability, personal injury actions requiring the application of medical trial techniques, the application of what is sometimes called legal medicine, in addition to many other areas involving engineering problems, family law, and corporate practices. Should such branches of law be subjected to the same kind of a covenant it could be highly detrimental to numerous relationships between attorneys and clients."

The ABA Committee said that its "opinion does not concern itself with settlement of class actions approved by the Court, as to which this Committee expresses no opinion." If the intended emphasis of this passage of Informal Opinion 1039 is on the fact that the settlement is of a class action, this Committee does not understand the distinction between the settlement of a class action and any other civil action so far as the applicability of DR 2-108(B) is concerned and does not draw any such distinction. If, on the other hand, the intended emphasis is on the fact that a settlement is approved by a court (which could be true in non-class actions as well as class actions), we reserve our opinion. That a disinterested tribunal has perceived in particular circumstances reason to approve an agreement providing for a departure from the general policy of clients' freedom of choice that DR 2-108(B) is meant to advance may make such a departure permissible.

For the reasons given and on the basis of the Ethical Considerations and ABA opinions that have been cited, we conclude that the arrangement contemplated by the inquiry would be contrary to DR 2-108(B).

Turning now to the inquirer's second question—whether an attorney as part of a settlement can agree that he will not refer a potential client to another attorney if that potential client has a claim against the defendant involved in the settlement—we conclude for many of the same reasons already given that this question must also be answered in the negative. While DR 2-108(B) speaks to the lawyer directly involved in the settlement and not to another lawyer whom he may suggest to a potential client, the circumstance is not substantially different in that in either case the settlement of the current action would involve a restrictive arrangement whereby the lawyer could not take the subsequent case himself or even suggest another attorney he believes to be qualified. Indeed, with respect to the latter circumstance, the arrangement contemplated would restrict the right of *another* lawyer to practice as a consequence of an agreement entered into by the inquiring lawyer.

Again, we cannot be sure from the limited information in the inquiry why the defendant may wish to impose restrictions on the ability of the inquiring lawyer to refer a potential client to another attorney, but there is no basis for concluding that prevention of harassment of the defendant or the doing of wrong to him is the motivating factor. Indeed, if such were the circumstance, it would fly in the face of DR 2-109(A) which states:

> "A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to: (1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person."

If the inquiring lawyer is particularly well-suited by specialized knowledge or experience to represent the claim of a client against the defendant, or acquainted with one or more other lawyers whom he believes to be similarly well-qualified, then it would appear that the denial of such competent counsel to prospective clients desiring to bring what they and their attorneys may believe to be meritorious actions would be the type of circumstance envisioned by DR 2-108(B) and clearly contrary to its intent. In the final analysis, it is the public's rights that must be safeguarded. DR 2-108(B) is an assurance of the public's right to counsel through the lawyer's right to practice.

June 28, 1977
Inquiry No. 77-3-7

Opinion No. 36

DR 9-102(A) and (B) (1) through (4); DR 6-101 (A)(3); DR 5-105(A), (B) and (C)— Practices of Law Firm Handling Client's Funds During Real Estate Transactions

A law firm with an active real estate practice raises three related questions regarding the handling of clients' funds during real estate transactions. *First,* whether it constitutes ethical practice to deposit different clients' funds in a common client account. *Second,* what general guidelines govern the handling of the clients' account and, specifically, whether it is ethically permissible to allow the balance in the common client account to exceed, on occasion, the $40,000 Federal Deposit Insurance Corporation limit. *Third,* whether it is ethically proper to deposit money designated for settlement purposes in an interest-bearing account and, if so, to whom the interest belongs, the buyer or the seller; the interest accrues only during the three to five day period between settlement and disbursement.

The Code of Professional Responsibility prohibits the commingling of funds of a lawyer or law firm and those of a client or clients. DR 9-102(A). However, the merging of funds of several clients in one account is permissible under DR 9-102(A):

> "All funds of clients . . . , other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts . . . ."

The general guidelines for the handling of the clients' account(s) are set forth in DR

9-102(B)(1) through (4). However, the firm's specific question as to the ethical permissibility of exceeding the $40,000 FDIC limit is not addressed in these provisions of the Code. We note that DR 6-101(A)(3) provides that "[a] lawyer shall not neglect a legal matter entrusted to him," but we do not believe that the mere exceeding of the FDIC limit would constitute neglect in the absence of some reason to suspect the soundness of the depository bank.

The Code of Professional Responsibility is silent on the issue of placing money designated for settlement purposes in an interest-bearing account. Certainly it is not prohibited. As a general matter, to deposit a client's money in such a way as to earn interest for him would appear to be consistent with Canon 7, whose overall direction is that "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." This Committee cannot rule on a matter of law, *i.e.*, whether the buyer or the seller controls the funds between settlement and disbursement and is, therefore, entitled to the interest. However, we invite the inquirer's attention to DR 5-105(A), (B), and (C), if, in any case the inquiring firm is handling, the buyer and the seller are both represented by the firm. This section of the Code places clear constraints on a law firm representing both parties, and requires full disclosure of the situation to the clients.

Inquiry No. 77-3-5
June 28, 1977

Opinion No. 37

DR 2-106(A) and (B); DR 2-110—Provisions of Contingent Fee Retainer Agreements With Respect to Payment of a Fee in the Event of Discharge or Withdrawal of the Attorney

A law firm asks three questions regarding retainer agreements providing for contingent fees. *First,* whether it is ethically permissible to provide in such an agreement that, in the event of discharge of the attorneys by the client, "we would be permitted to charge the client an hourly rate or a percentage of the greatest offer received as of the date of discharge, whichever is greater." *Second,* whether such a provision for payment of a fee despite termination of the representation would also be permissible if the termination came about as a result of withdrawal by the attorneys, rather than their discharge by the client. *Third,* whether it would ethically proper to include in the retainer agreement an assignment of funds with respect to such an agreed fee: that is, a provision allowing the attorneys to collect directly from the defendant or the defendant's insurer, out of any amount ultimately recovered, the stipulated fee.

We think that, with cautions and limitations to be noted, all three of the provisions in question would be ethically proper.

There is no provision of the Code of Professional Responsibility, nor any opinion of an ethics committee that we have found, dealing explicitly with any of the questions here posed. The governing ethical principles regarding fee arrangements are, however, laid down in general terms by DR 2-106(A), which reads in full as follows: "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." In a nutshell, the ethical prohibitions are against (a) illegal and (b) excessive fees. DR 2-106(b) furnishes some guidance as to what is a "clearly excessive" fee. It asserts that

> "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."

It then goes on to identify a number of factors that may be considered as "guides in determining the reasonableness of a fee," of which the eighth and last is "whether the fee is fixed or contingent." This provision, of course, recognizes in effect that a contingent fee is not in itself unethical, *see also* EC 2-20 and EC 5-7; and in addition recognizes that the fact of contingency itself may justify a higher fee than would otherwise be reasonable. *See* Mackinnon, Contingent Fees for Legal Services 62 (American Bar Foundation 1964). The converse of this proposition, of course, is that a reasonable fixed fee will ordinarily be lower than a reasonable contingent fee.

(1) As respects the provision contemplated by the first question posed, for a fee in the event of discharge by the client prior to completion of the representation, we see nothing ethically wrong in principle with the provision so long as the *amount* of the fee is reasonable. There appears to be nothing illegal about such an arrangement (which would, under DR 2-106(A), make it unethical), *cf. Friedman* v. *Harris*, 81 U.S. App. D.C. 317, 158 F.2d 187 (1946); nor anything inequitable or unprecedented about it. *See* Mackinnon, *supra* at 77-80, 217. It is merely required that the fee not be excessive.

We believe that the fee would not be excessive in the event it was stated at an hourly rate, so long as the hourly rate was reasonable, and the nature, quality and volume of the work to which it applied were also reasonable. We observe, however, that the mere fact that the fee is in the amount yielded by the agreed-to formula does not necessarily mean that the fee is reasonable. A client may be justified in discharging a lawyer because of dissatisfaction with the quality of the lawyer's services, and in such a case a fee less than the formula fee (or none at all) may be the reasonable fee. Similarly with respect to a fee determined in the alternative fashion that is contemplated by the inquiry—namely, a percentage of the best offer received up to the point of discharge: this would ordinarily not be excessive provided that there had been in fact a bona fide offer to settle, and the percentage specified was a reasonable one (which means, at the minimum, that it can be no larger than the percentage specified with regard to a final recovery). The Committee has previously expressed the view that fee arrangements should be in writing, *see* Opinions 25, 29. This strikes us as particularly important with respect to a fee arrangement like the one here discussed.

(2) As regards the provision for payment of a fee in the event of a withdrawal by the attorney, a somewhat more delicate question is involved, because there are ethical limitations on the right of an attorney to withdraw from an engagement. DR 2-110, which spells out these limitations, may usefully be quoted here in its entirety:

DR 2-110 Withdrawal from Employment

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory Withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical conditions renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive Withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disci-

plinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

The intentionally restrictive nature of these provisions is emphasized by EC 2-32, which states that "A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances. . . ." Nonetheless it is clear that if any of the conditions of DR 2-110(B) is met in a given instance, then an attorney ethically *must* withdraw (or seek leave of a pertinent tribunal to do so); and if any of those specified in DR 2-110(C) is met, he *may* do so. It is also clear that if the attorney's withdrawal is proper, he is generally entitled to a reasonable fee for services rendered prior to the withdrawal. Indeed, DR 2-110(A)(3), in stating that a lawyer who withdraws must refund to the client "any part of a fee paid in advance that has not been earned," clearly implies that he may properly retain any compensation that *was* earned. And if a particular fee is reasonable in the event that the client discharges the attorney, it should ordinarily be no less so if the attorney has, properly, initiated the withdrawal.

It is our view, however, that there is an important exception to this generality. In many circumstances where an attorney has withdrawn, the client will have to pay his new attorney a fee for the same services as had been performed prior to withdrawal by the former attorney. (The same is, of course, likely to be the case where the attorney was discharged by the client.) In such circumstances the termination of an attorney's employment in the midst of his representation will result in a loss either to the client, if he must pay two fees instead of one for the same services, or to the withdrawing lawyer, if he cannot claim a fee for valuable services rendered. We are of the view that this loss should be borne by the client only if he has responsibility for the circumstances leading to the loss.

The causes for withdrawal, both mandatory and permissive, which are spelled out by DR 2-110(B) and (C), fall into two general groupings: those that involve some fault, or at least an exercise of choice, on the part of the client; and those that do not. As to the first, it may fairly be said that the client bears responsibility; but not as to the second. The conditions specified by DR 2-110(B)(1) and (4)* and by DR 2-110(C)(1) and (5) are clearly in the first group; and those specified by DR 2-110(B)(3) and DR 2-110(C)(4), both referring to the mental or physical condition of the attorney, are clearly in the second, as in most circumstances would be DR 2-110(C)(3), which concerns the inability of the attorney to work with co-counsel. The remaining contingencies—DR 2-110(B)(2) and DR 2-110(C)(2), referring to the prospect of ethical violations resulting from continued employment—might be in either category, depending on the particular circumstances involved; and the same is presumably so with regard to DR 2-110(C)(6), which depends on other cause being found by a tribunal. It is the Committee's view that where the client will have to pay a fee to other attorneys for performing anew services previously rendered by the withdrawing attorney, which thereby became duplicative, would be clearly excessive within the meaning of DR 2-106(A) and (B).

One additional *caveat* may also be in order. In our view it would not be proper for the attorney to withdraw because his client had refused to accept a particular offer from the defendant, and then to charge a fee based upon such offer. We do not think that such a refusal on the client's part would fall within any of the circumstances specified by DR 2-110(C). Moreover, a contrary result would as a practical matter put the attorney in a position to force his client to settle a case in order to serve the attorney's interest rather than the client's.

(3) Finally, we see no ethical problem about a provision in a retainer agreement for an assignment of funds in the amount of the fee specified with respect to a termination of the engagement. Such an assignment of funds is simply a means of providing some assurance to the attorney that the retainer agreement will in this respect be performed. Assuming always that the specified fee is reasonable, and that the circumstances of the termination of the engagement are also proper, there is nothing ethically suspect about such a provision.

July 19, 1977
Inquiry No. 77-4-9

Opinion No. 38

Designation of Patent Agent on Letterhead

A law firm requests our opinion as to the propriety of listing a patent agent on its letterhead. The agent is a fulltime employee of the firm. He is a law school graduate with a bachelor of laws degree but is not a member of the Bar, either in the District of Columbia or in any other jurisdiction. He is of record in the United States Patent and Trademark Office as a registered agent and is admitted to practice before that agency in connection with the preparation and prosecution of patent applications. The name of the agent would be set apart from the lawyers of the firm and would be followed by the legend "Patent Agent."

We conclude that there would be no impropriety in listing the patent on the firm's letterhead under the circumstances herein described. Inasmuch as the term "patent agent" does not imply that the agent is a member of the Bar and engaged in the practice of law, such a listing is not misleading and does not appear to be in conflict with any of the disciplinary rules under Canon 2 or Canon 3. Our Opinion No. 19, which approves the designation of a para-legal employee as a "legal assistant" on a business card, supports the propriety of the designation of a patent agent on a law firm's letterhead.

Inquiry No. 77-5-12
July 19, 1977

Opinion No. 39

DR 2-103(A) and (C); DR 2-107(A); DR 3-101(A); DR 3-102(A)—Lay Employment Agency Referring Lawyers to Other Lawyers and Firms for Hourly Work and for Permanent Employment; Manner of Payment of Referral Fees

We have been asked by a non-lawyer whether his company will be involved in the violation of any provision of the Code of Professional Responsibility if it establishes, and advertises to lawyers, a referral service for lawyers willing to accept temporary assignments from other lawyers and law firms. The referral agency would charge those lawyers and law firms using the the temporary services of a lawyer registered with it an hourly charge varying with the experience of the lawyer referred. The total hourly charges would be paid by the hiring law firm to the agency and the agency would then pay the referred lawyer a portion thereof, but retain a portion of each hour's fee paid, as a referral fee or commission. The terms of the inquirer's proposed written agreement with employing law firms provide that lawyers registered with the agency will not be employees or agents of the agency but that the agency will be the agent of lawyers registered with it for the collection of any hourly charges earned by such referred lawyers as a result of working for the law firms to which they have been referred. Finally, the proposed agreement provides that if a permanent position is offered by the hiring law firm to a lawyer referred by the agency, and accepted, a fee of $2,500 will be payable by the law firm to the agency.

*As we have noted above, where a client has discharged the attorney, because of dissatisfaction with the quality of the latter's services, the reasonableness of any fee may depend upon whether the dissatisfaction was well founded.

The provisions of Canons 2 and 3 relating to advertising, use of lay intermediaries, and fee splitting, are invoked by this inquiry.

The disciplinary rules relating to Canon 2 set forth the general restrictions upon a lawyer's advertising his services and using lay intermediaries in offering his services to others. Of course the Supreme Court's recent decision in *Bates* v. *State Bar of Arizona,* 53 L.Ed.2d 810 (1977) has significantly modified the extent to which the bar can prohibit advertising even to the general public. However, we do not here need to consider the ramifications of that decision since even the disciplinary rules relating to advertising which were in effect before that decision do not prohibit the advertising of a lawyer's services to other lawyers.

It is clear as a matter of both text and precedent that the provisions of Canon 2 were intended to apply only to the offering of a lawyer's professional services to lay persons or organizations who are potential clients and not to the offering of services to other lawyers and law firms. Thus DR 2-103(A) provides that a lawyer shall not recommend employment as a private practitioner of himself, his partner or associate to a "non-lawyer," and DR 2-103(C) provides that a lawyer shall not request another person or organization to recommend his employment "as a private practitioner." On two occasions the Ethics Committee of the American Bar Association has found that advertising by attorneys seeking employment with other law firms does not violate the restrictions on advertising by attorneys. Informal Opinion 695, March 31, 1964, and Informal Decision C-711, June 16, 1974. In both instances, the ABA committee quoted with approval from Drinker's *Legal Ethics* (1953), to the effect that Canon 27 (an earlier canon dealing with advertising by attorneys) "does not apply to the solicitation of full-time employment with a corporation or full or part-time employment with a law firm," (page 220). Similarly, the New York City Bar Association's Ethics Committee, in Opinion B-42, held it was not improper for a lawyer to seek part-time salaried employment from another lawyer and that accordingly an advertisement could properly be placed in a law journal or other publication published for the use of lawyers.[1]

Thus, since the intent of the provisions of Canon 2 was to prohibit the offering of an attorney's services to potential clients and not to other lawyers, there is no ethical impropriety in an attorney using a profitmaking lay referral organization to advertise the availability of his services to other lawyers and law firms.

A more difficult issue is presented by the instant inquiry, as to whether a profitmaking lay agency can refer lawyers to other lawyers and law firms and charge the latter an hourly fee for such referrals based on the hours worked by the lawyers referred. It does not appear from the reported opinions that this precise question has ever been considered by any ethics committees. Thus, there is no direct precedent to give us guidance. After examining the rules relating to lay intermediaries, and the principles underlying those rules, however, we conclude that none of them directly forbids such a referral arrangement. We also conclude, however, that unless the referred lawyer performs his services in all significant respects as an employee of the hiring lawyer or law firm, even if the employment is only temporary, the rules pertaining to the association of outside counsel would apply.

The ethical considerations and disciplinary rules with regard to the practice of law by lay persons and entities are set forth under Canon 3. The rules possibly pertinent here prohibit a lawyer's aiding a non-lawyer in the unauthorized practice of law (DR 3-101(A)); and sharing his legal fees with a non-lawyer (DR 3-102(A)). EC 3-1 explains that "The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services," and that "the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession." EC 3-3 asserts: "The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment." EC 3-6 states: "A lawyer often delegates tasks to clerks, secretaries and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product."

The inquirer's agency does not propose to provide services to, or otherwise have any dealings with, the general public. Its written materials expressly state that attorneys registered with it will not be the employees of the agency. Because of these factors, the provisions under Canon 3 referred to above, insofar as they are intended to prohibit a lay agency from providing legal services to the general public, are not directly applicable.[2] We must still inquire, however, whether the underlying purpose of the rules against the practice of law by lay organizations would be jeopardized by the proposed referral arrangement even if the referring agency does not directly advertise to, or otherwise deal with, members of the public.

As the ethical considerations quoted above make clear, the underlying purposes of the disciplinary rules under Canon 3 are to ensure that persons providing legal services to members of the public have the necessary integrity, competence and responsibility. The instant proposal would not, in our view, necessarily jeopardize these purposes. This is particularly true if, as we assume will ordinarily if not invariably be the case, the individual lawyer referred by the lay agency to other lawyers or law firms becomes the employee of the law firm to which he is referred, even though it may be only on a temporary or part-time basis. In such circumstances, the employing lawyer would maintain a direct relationship with the client and be responsible to the client for the work product of the lawyer hired through the referral agency in the same way that an employing lawyer would be responsible for the work product of all other lawyers working for him. And, of course, the individual lawyer referred would be required under the Code to exert his best efforts on behalf of any clients of the employing law firm free from any divided loyalties. (Certainly, if, in a particular instance, the individual lawyer were not free from divided loyalties, he should not accept the temporary employment.) Nor is there any reason to assume that a referred lawyer would not exert his best efforts on behalf of the hiring firm's clients, since a poor performance would tend to bring about the speedy termination of his services and diminish his opportunities for future referrals. In short, there is no reason to apprehend that lawyers referred by a referral agency to other lawyers will fail to exert their best efforts to satisfy the employing lawyer or law firm. Their chances of future employment obviously depend upon them so doing.

If, on the other hand, the referred lawyer were not to be the employee of the employing lawyer or law firm, so that the latter did not have full responsibility to the client for the quality of the lawyer's work, then new ethical responsibilities would come into play. As EC 2-22 teaches: "Without the consent of the client, a lawyer may not associate in a particular matter another lawyer outside his firm." And in such circumstances, the division of fees between the referred lawyer and the retaining firm would become subject to the requirements of DR 2-107(A), which provides:

> "A lawyer shall not divide a fee for legal services with another who is not a partner in or associate of his law firm or law office unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
>
> (2) The division is made in proportion to the services performed and responsibility as-

[1]The New York Bar opinion suggested, however, that it would not be proper for the lawyer to list his proposed fee basis. In view of the recent Supreme Court decision in *Bates* v. *State Bar of Arizona,* such a general restriction could probably no longer be sustained.

[2]This fact makes it unnecessary for us to consider the growing body of opinions and code provisions dealing with the exceptions to the lay intermediary rule allowing lay organizations, and bar referral services to refer members of the public to designated attorneys. See, *e.g.*, DR 2-103(D)(5) as amended by the District Court of Appeals; Opinion 30, Committee on Legal Ethics, District of Columbia Bar, Feb. 22, 1977.

sumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client."

This provision, if applicable to the arrangement here under consideration, would presumably require the client's approval of the entirety of the referral agency's arrangements with regard to the referred lawyer's services. We assume that the proposal here under consideration does not contemplate a referred lawyer's working otherwise than as an employee of the hiring firm, within the sense of the foregoing discussion, but we call attention to these provisions in case we are mistaken on this point.

Finally, we note that EC 3-8 states that "since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman"; and DR 3-102 gives this disciplinary sanction. On its face, the instant proposal does not require the lawyer to share "legal fees" with a layman since the meaning of a legal fee under the Code is fairly clearly the fee a lawyer or law firm charges a client being served, not the salary paid to an employee who does some or all of the work. We do not understand the proposal to require any such "legal fees" charged clients to be paid either to the referring agency or to the referred lawyer—so long, of course, as the latter is acting as an employee of the hiring firm. Rather, the referred lawyer is to be paid a fixed salary, based on an hourly rate, and a fixed portion of that salary is in turn to be paid the referral agency. We caution, however, that the mode of payment to the referred lawyer which is proposed must not be allowed to become a means by which the referral agency exercises any control over the manner in which the referred lawyer's professional services are rendered.

If, as we have concluded, it is permissible for the hiring firm to pay an hourly fee, including commission, to the referral agency for the work of the referred lawyer, then *a fortiori* it is permissible for the firm to pay a flat fee in the event of the offer and acceptance of a permanent position for a lawyer referred by the agency. In such instances, the referred lawyer clearly will become in all respects the employee of the hiring law firm and there will be no basis for any suspicion of continuing control by the referral agency over the work of the referred lawyer.

Partial Dissent of Mr. Isbell, joined by Messrs. Ignatius, Jaffe, Schultz and West

We agree with the Committee's opinion on this request as to all matters save one: the manner in which payment is proposed to be made for services which are rendered and compensated on an hourly basis.

As the opinion correctly points out, unless in a given instance the client has consented to the employment of the referred lawyer, and to the amount and manner of his payment—an eventuality that is surely unlikely in the extreme—then the referred lawyer must do his professional work as an employee of the hiring lawyer or firm, and subject solely to their control. That control must be exclusive of any lay control—and specifically, in the present context, of any control by the referral agency.

The opinion takes note of the importance of this point, and voices a caution against allowing the mode of payment to become a vehicle for control by the agency of the professional work of the lawyers it refers. In our view, however, a mere caution to this effect is insufficient. The fact of control of payment will not merely give the appearance of control of substance, but provide a real and ever-present threat of actual control. It is our view, accordingly, that the proposed arrangement would be ethically permissible only if the hourly compensation were paid directly by the hiring firm to the referred lawyer. Whether the agency's referral fee is then paid in turn by the lawyer to the agency, or by the firm direct to the agency, is a matter of indifference: in either case, the agency would not then be interposed between the lawyer and either his employer or his ultimate client.

There is of course no such interposition of a lay intermediary in the proposed arrangement for a fee when a referred lawyer accepts permanent employment. Our dissent therefore goes only to the manner in which the hourly compensation, and fees with respect thereto, are proposed to be paid.

Inquiry No. 77-3-6
October 19, 1977

Opinion No. 41

DR 2-101(A)—Cooperation in Magazine Article about Lawyers

A magazine published for the benefit of members of an industry that is subject to regulation by a federal agency wants to publish an article about lawyers who practice before the agency in matters involving the industry. it has sent a questionnaire to 11 District of Columbia law firms known to be engaged in that practice. Responses to the questionnaire would be the basis of an article that would be a profile of the 11 firms. Cooperating lawyers and firms would be able to review and approve the article before it was published.

The questionnaire asks for background information on individual lawyers and law firms, for information concerning clients in the industry and cases involving the industry in which the lawyer or the firm has participated and for views on certain issues affecting the industry that are pending before the regulatory agency or Congress.

We are asked whether a lawyer or law firm may respond to the questionnaire without violating some provision of the Code of Professional Responsibility. The relevant provision is DR 2-101(A), which provides:

"A lawyer shall not prepare, cause to be prepared, use or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, 'public communication' includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

Two cases have been decided under former Canon 27, one sentence of which read:

"Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper."

In one case, the Appellate Division of the New York Supreme Court found a violation in the cooperation by a New York law firm in the preparation of an article about it in Life Magazine. *In re Connelly,* 18 App. Div. 2d 466, 240 N.Y.S. 2d 126 (1st Dept. 1963). In the other, the Florida Supreme Court found no violation in a lawyer's cooperation in a series of newspaper articles about him. *State ex rel. Florida Bar* v. *Nichols,* 151 So. 2d 257 (Fla. 1963). Subsequently, the California Supreme Court found no violation of former Rule 2 of that state's Rules of Professional Conduct when the lawyer members of a legal clinic cooperated with the media in the preparation of stories about the clinic.[1] *Jacoby* v. *State Bar,* 19 Cal.3d 359, 138 Cal. Rptr. 77 (1977).

We need not tarry long with these cases, trying to rationalize them or to line up our case with them. We do note that our case is different from any of the three described cases in that the magazine article will relate to a substantial number of lawyers and law firms, rather than focusing on one, thus perhaps attenuating any possibility that statements contained in it would be calculated to attract clients.

But we consider that a minor point. The important thing is that all three cases were decided before *Bates* v. *State Bar of Arizona,* 53 L.Ed.2d 810 (1977), was decided by the Supreme Court. In that case the Court held that DR 2-101(B)[2] could not constitutionally be applied to lawyers who directly

[1] Rule 2 provided in relevant part that:

"A member of the State Bar shall not solicit professional employment by advertisement or otherwise.

"Without limiting the generality of the foregoing a member of the State Bar shall not solicit professional employment by . . . [u]sing a newspaper, magazine, radio, television, books, circulars, pamphlets, or any medium of communication, whether or not for compensation, or advertise the name of the lawyer or his law firm or the fact that he is a member of the State Bar or the bar of any jurisdiction. . . ."

advertised their services and the fees charged for them. The full reach of the *Bates* decision remains to be explored, but it is hard to imagine that a lawyer who cannot constitutionally be disciplined for advertising his services directly could constitutionally be disciplined for responding to a magazine editor's request for information about his practice.

This committee has said that it would not pass on the constitutionality of provisions of the Code. However, when the Committee considers a Canon 2 question, it cannot rationally ignore the recent *Bates* opinion. At the very least that opinion counsels a narrow reading of DR 2-101(A). DR 2-101(A) forbids a lawyer to "prepare" or "cause" to be prepared" or "use" or "participate in the use of" certain public communications. We believe that in the circumstances described by our inquirer a lawyer who responded to the magazine's questionnaire would not be preparing a public communication or causing one to be prepared; answering a question, whether in written or oral form, in ordinary speech is not the same thing as preparing a public communication. Nor would the lawyer be using or participating in the use of a public communication. We are not clear just what "use" means in the context of DR 2-101(A), but, again, cooperation with an interviewer is not ordinarily thought of as using or even participating in the use of the "public communication" that the interviewer plans to prepare. Thus, it is our opinion that a lawyer or law firm who cooperated with the magazine would not be in violation of DR 2-101(A).

We note that, under the revision of Canon 2 that has been proposed to the Court of Appeals by the Board of Governors on the recommendation of this Committee, the present DR 2-101(A) would be repealed.

Inq. No. 77-2-3
November 22, 1977

Opinion No. 42

DR 2-106(A) and (B)—EC 2-20—Written Retainer Agreement Based on Combination of Contingent Fee Plus Time Charges

An attorney has inquired regarding the propriety of his entering into a certain written retainer agreement with a client in a personal injury case. The agreement provides that the attorney will receive a contingent fee based on the amount of the judgment or settlement, as the case may be, but that in the event of a judgment and an appeal taken by the defendant, the attorney will charge, in addition to the contingent fee, a fee based on the number of hours times an agreed hourly rate for the services performed in connection with the appeal. The attorney is particularly concerned about a situation where his client, the plaintiff in a personal injury suit, obtains a verdict after a trial, the defendant appeals, and the plaintiff is successful on appeal. He asks whether it is ethical for an attorney to charge the client the original contingent fee agreed upon plus an amount based upon the number of hours that the attorney devoted to the appeal, assuming of couse that the client agreed to such a fee arrangement, in writing, when the attorney was retained.

DR 2-106, entitled Fees for Legal Services, provides in part:

> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.

The basic question is whether the above-described fee agreement would result in an "illegal or clearly excessive fee." This is a judgment a lawyer must make after reviewing the facts and circumstances and the various factors listed as guides in determining the reasonableness of a fee under (B) above. In setting a fee for conducting litigation, whether it be on a contingent basis or otherwise, a lawyer must, in addition, carefully consider the prospects of success at the outset and, in particular, the fee customarily charged in the locality for similar legal services. (See EC 2-20 for a general discussion of contingent fee arrangements.) There is nothing intrinsically unethical or improper about the arrangement described by the attorney, assuming of course that a full disclosure has been made to the client. There may be circumstances in which the terms of such arrangement may make it unethical or improper, but no such circumstances are disclosed by this inquiry. The Committee has not been asked for its opinion on the propriety of actual contingent fee percentages or hourly rates contemplated by the attorney.

Inquiry No. 77-9-16
November 23, 1977

Opinion No. 44

DR 5-101(B), DR 5-102—Lawyers Serving as Both Witnesses and Advocates In The Same Proceedings—Right to Self-Representation

We have been asked to advise whether the Code of Professional Responsibility prohibits an attorney from representing his or her law firm in litigation when a lawyer in the firm will be called to testify as a witness at trial. DR 5-101(B) and DR 5-102 generally prohibit attorneys from accepting or continuing employment when they, or members of their firms, will be called as witnesses in pending or contemplated litigation. The issue raised by this inquiry, however, is whether that prohibition applies when it is not an outside client but the attorney's own firm that is a party to the litigation. We conclude that in such situations the prohibitions of DR 5-101(B) and DR 5-102 do not apply.

The partners of the law firm with which the inquirer is associated have been joined as counterclaim defendants in a lawsuit concerning the eligibility of a former partner to receive benefits under the firm's health insurance plan. The managing partner and the inquirer are presently counsel of record for the partners of the firm in the litigation, which will involve questions of contract interpretation, the intent of the parties, the relationship between the former partner and the firm, and various actions of the present and former partners. The managing partner has already been deposed and is expected to testify at trial but does not intend to participate fully as the firm's counsel during trial and plans to conduct the examination of the managing partner. The inquiry does not explain why the firm does not wish to retain outside counsel.

Specifically, we have been asked: (a) whether the managing partner may continue to represent the firm: and (b) whether the inquirer—an associate with the firm—may continue to represent the firm. DR 5-101(B) provides:

> (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to

[3] "A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, display advertisements in the city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf except as permitted under DR 2-103."

the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Similarly, DR 5-102 requires withdrawal as counsel when a lawyer learns, or it is obvious, that he or she, or a lawyer in the firm, ought to be called as a witness in pending litigation.[1]

DR 5-101(B) contains four exceptions to the general rule that a lawyer may not serve as both a witness and an advocate in the same litigation. The first three exceptions allow attorneys to play this dual role in specified situations where there will be little factual dispute or where the factual issues involved are incidental to the main issues in the case. The fourth exception permits the practice where a substantial hardship would accompany application of the rule in a particular case. We need not determine whether any of these exceptions are triggered by the facts of the present inquiry because we conclude that the general rule itself does not apply.

DR 5-101(B) and DR 5-102 prohibit only the acceptance or continuation of "employment in contemplated or pending litigation." Since the managing partner and the associate are representing their own firm rather than being retained by outside clients, it is our opinion that they have not been "employed" for the purposes of the pending litigation and that the quoted disciplinary rules do not, therefore, apply. The term "employment" typically refers to a service relationship between two distinct individuals or entities whose interests are not coextensive. Here, however, there is such an identity of interests between the firm and its own lawyers as to render the use of the term "employment" inappropriate. The proposed arrangement is in substance more properly viewed as analogous to *pro se* representation. This construction is consistent with both the interests underlying our strong societal interest in protecting the right to self-representation and the policies underlying the rules themselves.

One of the principles most firmly rooted in our legal tradition is the principle that parties have a right to represent themselves in litigation. This right is guaranteed in the federal courts by statute, 28 U.S.C. § 1654, and is also protected by the Constitution, *Faretta* v. *California,* 422 U.S. 806, 834-36 (1975). Lower courts have recognized that representation of an organization by one of its members is similar to protected *pro se* appearances and have held such representation to be constitutionally protected as well. *See, e.g., Collex, Inc.* v. *Walsh,* 394 F. Supp. 225, 227 (E.D. Pa. 1975); *cf. In the Matter of Holiday's Tax Services, Inc.,* 417 F. Supp. 182, 184 (E.D.N.Y. 1976). The rationale of these cases stems from a firmly held belief that individuals and organizations should have the freedom to decide that their own interests can best be served through self-representation. Here, the inquirer's law firm has made such a determination and wishes to rely on two of its own attorneys as trial counsel. Perhaps this is because the firm's attorneys are particularly well acquainted with the pertinent facts. Perhaps the firm has decided that the amount of money at stake does not warrant the expense of retaining outside counsel. There could even be certain embarrassing facts relating to the relationship between the former partner and the firm that the firm would rather not disclose even to outside counsel. Whatever the reason, the law firm can properly determine that representation by its own attorneys is particularly valuable, and this determination is entitled to deference unless our strong societal interest in client autonomy is outweighed by the policies underlying the rules. Under the facts of the present inquiry, however, those policies would not be advanced by the application of the rules.

The rules themselves do not disclose the purposes for which they were promulgated, but EC 5-9 suggests that they are intended to guard against certain potential dangers. According to that provision, they are designed primarily to protect the client. Because an attorney-witness can more easily be impeached for interest, his or her effectiveness as a witness for the client may be reduced. However, since the client is the beneficiary of this protection, we believe that the client can properly waive it. This conclusion is reinforced by the strong societal interest that exists in allowing clients to choose their own advocates—an interest that, as discussed above, has constitutional underpinnings.[2]

A second justification offered by EC 5-9 is that it assists opposing counsel who might be handicapped in challenging the credibility of a witness who is also an advocate for a party in the case. The Ethical Consideration never explains why lawyer testimony places opposing counsel at a disadvantage, and we give little weight to this justification. A lawyer-witness is subject to the very same oath and scope of questioning as any other witness. Therefore, opposing counsel has adequate means available to test the witness' credibility. In fact, if opposing counsel is able to point out inconsistencies in the lawyer-witness' testimony, the resulting impeachment value may be even greater precisely because the witness is an attorney who, presumably, takes the stand better equipped than a lay person to avoid the pitfalls of cross-examination.

It has also been suggested that the Disciplinary Rules here at issue are justified because they protect the dignity of the legal profession. It is argued that, if lawyers are permitted to testify on behalf of their clients, the public may erroneously believe that lawyers will alter their testimony to suit the interests of those clients, thereby injuring the reputation of the legal profession. *See* Enker, Arnold N., "The Rationale Of The Rule That Forbids A Lawyer To Be Advocate And Witness In The Same Case," 1977 *American Bar Foundation Research Journal* 455, 458 (Spring 1977). We find this rationale to be inadequate to defeat a law firm's interest in being represented by its own attorneys.

There are, however, two additional concerns that merit serious consideration. The Disciplinary Rules at issue prevent the awkwardness and seeming impropriety that can exist when attorneys conduct examinations of themselves at trial. Although this rationale is nowhere articulated in the Rules or Ethical Considerations, it does reflect an important benefit served by the prohibitions at issue. Without the Rules, we would either have to abandon the traditional question-and-answer method of presenting testimony or make a mockery of the process by requiring attorneys to ask and answer their own questions. In addition, the Rules can serve to prevent a more serious frustration of the fact-finding process. The trier of fact—especially if it is a jury—might well be confused when an attorney serves as both a witness and an advocate in the same trial. When the fact finder hears objective testimony and then partisan argument from the same individual concerning the same event, there is a substantial danger that evidentiary weight will be given to statements that in reality constitute nothing more than mere argument. As important as these justifications may be, it must be noted that the dangers to which they are directed exist in all *pro se* cases and have not generally been viewed as

[1]DR 5-102 provides:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

[2]In considering the general scope of DR 5-101 (B) and DR 5-102, the Ethics Committee of the American Bar Association, in Formal Opinion 339 (1975), also noted that the primary purpose of the Rules was to protect clients. That opinion does not discuss the issue of waiver but does state that the lawyer and the client should jointly determine whether the exception set out in DR 5-101 (B)(4) applies.

sufficient to overcome our societal interest in permitting self-representation. Moreover, those dangers do not pose a problem in the context of this inquiry since they are present only when the same individual serves both as a witness and as an advocate at trial. Here, the inquirer has stated that neither he nor the managing partner will present both testimony and argument, thereby obviating the need for us to decide whether such a procedure, if utilized, would withstand scrutiny under the Disciplinary Rules.

The policies underlying DR 5-10(B) and DR 5-102 are not offended by the type of representation proposed in this inquiry. Consequently, the purposes of the Rules would not be advanced by straining the concept of "employment" in order to apply it to what is essentially a case of *pro se* representation. Moreover, such a construction would undermine the high priority that we have traditionally accorded the right to self-representation. Therefore, it is our opinion that, under the facts presented in this inquiry: (a) both the managing partner and the inquirer may ethically serve as counsel of record for their firm in the pending litigation; and (b) the inquirer may ethically serve as trial counsel for the firm, and may conduct the examination of the firm's managing partner. Finally, we note that, unlike many requests for our views, the present inquiry relates to a matter that is currently in litigation. This suggests that our opinion may ultimately be considered by a court, even though it is not based upon a full factual record developed in an adversary proceeding. Nevertheless, we have attempted to carefully consider all of the relevant factors and we trust that our opinion will be viewed accordingly.

January 24, 1978
Inq. No. 77-11-21

Opinion No. 45

DR 2-102(B)—DR 3-103(A)—Partnership with Non-Lawyer—Letterhead Listing Non-Lawyers

A member of the D.C. and Maryland Bars whose practice for 35 years has been "restricted exclusively to transportation law" inquires whether he may revise his legal letterhead in such a way as to indicate partnership in practice with his wife, a non-lawyer, who has recently been admitted to practice before the Interstate Commerce Commission in accordance with that agency's rules permitting representation by lay persons. His proposed letterhead would have at the top of the page the heading "Law Offices" and directly below that the firm name "Doe and Doe" with an address and telephone number. Beneath this at the left-hand side of the page would appear his own full name with a designation "Attorney at Law" and at the right-hand side of the page his wife's full name designated, "I.C.C. Registered Practitioner."

It is possible that such a letterhead would be deemed ethical if the Court of Appeals should approve the changes in the disciplinary rules under Canon 2 of the Code of Professional Responsibility recommended recently by this committee. Given the existing restrictions of the Code, however, the inquiry must plainly be answered in the negative.

The proposed letterhead, with its name Doe and Doe under the heading "Law Offices," clearly falls under the prohibition of DR 2-102(B), which declares that "a lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, *or a firm name containing names other than those of one or more of the lawyers in the firm*. . . " Emphasis added). The wife's name is, clearly enough, included in the firm name, and she is not a lawyer, so that DR 2-102(B) is transgressed.

The committee's proposed amendments to DR 2-101 through DR 2-105 would omit any specific prohibition on use of a non-lawyer's name in a firm name under which a lawyer practices, and for this reason the ethical result might be different if those amendments were adopted. It appears, however, that the inquirer's proposed arrangement may also fall within the ban of another provision of the Code, which is not the subject of any pending proposals for amendment. The proposed firm name, linking husband and wife as Doe and Doe under the heading "Law Offices," fairly clearly implies (even though the inquiry does not explicitly state), that there is a partnership between them, and that the husband is practicing law in that partnership. If this is indeed the case, then the underlying arrangement falls afoul of DR 3-103(A), which says flatly: "A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." This rule is explained by Ethical Consideration 3-8: "Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman."

It is, in sum, hard to see any ethical ground upon which the arrangement proposed in this inquiry can stand at the presen time.

Inquiry No. 77-11-23
April 25, 1978

Opinion No. 47

DR 2-102—Letterheads, Cards and Announcements of Law Firms with Single Office in the District of Columbia—No Need to Negate Admission of Firm Lawyers in Other Jurisdictions

An attorney in private practice in the District of Columbia seeks the Committee's advice on five matters stemming from the planned merger of his law firm with another. The attorneys in each firm are admitted to practice solely in the District of Columbia, and the merged firm will have one office, which will be located in the District of Columbia.

The first question posed by the inquirer relates to the necessity of associating with local counsel in jurisdictions where none of the firm's members is admitted to practice. The fact pattern presented to the Committee is as follows.

An attorney, licensed to practice solely in D.C., is retained by a client to represent him/her in a federal claim, namely, a sex discrimination case. In a case of this nature, it is essential that a claim be filed with a local or state agency prior to the filing of the claim in the appropriate federal district court. Moreover, the federal district court, as the ultimate recipient of the claim has no requirement that an attorney appearing before it be admitted to practice in the jurisdiction. (This is a highly improbable situation; the inquirer admitted to knowing of no federal district court where this was the case.) Thus, in this fact pattern, no local counsel need be associated to represent the client's interest before the federal district court. The question raised is whether the attorney must associate with local counsel prior to filing charges with the local or state agency.

Canon 3-9 states that "[r]egulation of the practice of law is accomplished principally by the states." This being the case, a response to the inquiry can only be provided by reference to the appropriate state or local regulations regarding representation before the agency and, as such, the question posed is really one of law, not ethics. Since, according to the Committee's Rule C-5, it "will not ordinarily give opinions on questions of law," the Committee declines to respond to this particular question.

The inquirer also requests guidance on whether it is essential for the letterhead of the merged firm to indicate that the firm's members are not admitted to practice in jurisdictions other than the District of Columbia. The letterhead does not need to note specifically the jurisdictional limitations of the firm's members. Since the merged firm will have but one office located in the District of Columbia, a letterhead containing the firm name and address cannot mislead the public into believing that the members of the firm are licensed in a jurisdiction other than the District of Columbia. If the firm had branch offices and its members were not licensed in the applicable jurisdiction, then the jurisdictional limitations of members of a firm would need to be made clear in the letterhead. DR 2-102(D).

The third question raised by the inquirer is a variation of the previous question and concerns the necessity for indicating in the letterhead that none of the attorneys in the merged firm is admitted to practice in a foreign jurisdiction when responding to a request from a client who resides outside of the District of Columbia. The letterhead described in response to the second question

makes the jurisdictional limitations of the attorneys clear, and this format is appropriate when replying to clients from jurisdictions other than the District of Columbia.

A further variation is posed by the fourth question, which refers to the need to note jurisdictional limitations on the calling cards of the firm's members. DR 2-102(A)(1) provides that a lawyer may use a professional card "identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of the law firm" and certain limited specialties, *e.g.,* Patent Attorney. There is no need to specify the jurisdiction in which the lawyer is admitted to practice in the fact pattern presented. All attorneys in the merged firm are admitted to practice in the District of Columbia, and providing the District of Columbia address of the law firm should not lead anyone to conclude that the attorneys are admitted to practice elsewhere.

The final question again concerns the need to specify jurisdictional limitations, this time on the cards announcing the merger of the law firms. Limitations on the contents of professional announcement cards are covered by DR 2-102(A)(2). Again, as with letterheads and calling cards, it is not essential to note the jurisdictional limitations of the firm's members, so long as the announcement is not intended to obfuscate this point. By placing the firm's new District of Columbia address on the announcement, no confusion should result.

Inquiry No. 78-3-7
April 25, 1978

Opinion No. 48

DR 5-101(A); DR 9-101—Continuation of Legal Practice After Assuming Quasi-Judicial Office; Conflicts of Interest; Appearance of Impropriety

We have been asked by an attorney who was recently appointed to the Human Rights Commission of the District of Columbia whether his ethical obligations require him to refrain from representing clients in cases before the Commission and in other related cases. Because the commencement of his term of office is imminent, the attorney has requested that we issue our opinion on an expedited basis. We conclude that the provisions of the Code of Professional Responsibility, which instruct lawyers to avoid even the appearance of professional impropriety, preclude the inquiring attorney from representing clients in cases before either the Commission, the agency that investigates charges subject to the Commission's jurisdiction, or the Court that reviews Commission decisions. However, the attorney may continue to handle cases before other tribunals provided that conflicts of interest are avoided.

Facts

The inquiring attorney was informed very recently that he has been appointed to the Human Rights Commission of the District of Columbia. He is scheduled to take office within the next few days to fill a vacant term that expires on December 31, 1978, and there is a strong possibility that he will be reappointed upon the expiration of that term. The Commission is the District of Columbia administrative agency that has final, non-judicial authority over discrimination complaints that arise within the District. The issues involved in this inquiry arise because the attorney is currently engaged in private practice handling employment discrimination cases before federal and District of Columbia courts and administrative agencies, including the Commission. The inquirer wishes to know to what extent, if any, he may continue to handle such cases while serving as a Commissioner.

The inquiring attorney represents, on a continuing basis, a significant number of individuals who file discrimination charges with the Office of Human Rights—the agency responsible for the investigation and conciliation of discrimination charges—and with the prosecution of such charges before the Commission. In the past, some of the cases filed by the inquiring attorney before the Office of Human Rights have proceeded to the Commission for a decision and, at the present time, the inquiring attorney represents one client in a matter pending before the Commission. In order to adequately resolve the issues raised by this inquiry, it is necessary to consider both the nature of the attorney's practice, and the administrative enforcement scheme under which discrimination claims are resolved.

The inquiring attorney presently practices alone, and 90 percent of his practice relates to employment discrimination cases handled on behalf of complainants. However, the attorney is in the process of merging his practice with that of another attorney, who is presently engaged in a more general legal practice. The newly formed office will continued to devote a substantial percentage of its resources to employment discrimination cases, offering clients both legal advice and direct representation before District of Columbia and federal tribunals.

In the District of Columbia, individuals seeking redress of discrimination claims may either file suit in courts of appropriate jurisdiction for violation of the District of Columbia Human Rights Law or, alternatively, they may pursue their administrative remedies with the right of judicial review by the District of Columbia Court of Appeals. In many instances, victims of employment discrimination also have rights of action before the federal Equal Employment Opportunity Commission but, typically, initial recourse to the District of Columbia Office of Human Rights is a prerequisite to EEOC action. If a complainant elects to pursue his or her administrative remedies, the Human Rights Law requires that certain specific procedures be followed.

A complaint must first be filed with the District of Columbia Office of Human Rights, which makes an initial determination concerning jurisdiction, and, if jurisdiction exists, conducts an investigation to determine if there is probable cause supporting the discrimination charge. If probable cause is found, the Office may then engage in conciliation efforts. Successful conciliation can result in a dispositive agreement between the parties that is deemed to be an order of the Commission, or the agreement may be incorporated into a judicial consent decree. The Office is also authorized to seek whatever injunctive relief may be necessary to preserve the *status quo* pending final action on the complaint.

If a finding of probable case is made but conciliation efforts fail, the Office is required to issue, in the name of the Commission, a formal complaint which must be answered by the respondent. A hearing is then held before a hearing examiner who makes a report to a panel, consisting of three Commissioners, that is authorized to act in the name of the Commission. Based upon that hearing report, the panel then issues an Order resolving the issues raised by the complaint and providing for any necessary relief. Section 33.3(c) of the Human Rights Law specifically prohibits any Commissioner from participating in a case if he or she was involved in the investigation or conciliation efforts in that case, or has participated in any decision related to the merits of the case.

Although particular cases are decided by panels composed of three individual Commissioners, the entire Commission is authorized to consult with respect to certain matters, including the issuance of guidelines regulating investigations undertaken by the Office of Human Rights. According to the inquiring attorney, however, instances in which the entire Commission confers are very rare. In fact, the attorney asserts that even deliberation among the members of a given panel is rare. In practice, individual cases tend to be decided on the basis of the hearing examiners' reports with only minimal communication between panel members.

Human Rights Commissioners do not receive salaries for performing their duties. Consequently, the Office of Commissioner is not considered to be a full-time job. There are a total of fourteen Commissioners, essentially all of whom have some form of other employment. Four of these Commissioners, not including the inquiring attorney, are lawyers, and all four are engaged in some other type of legal practice, although no other Commissioner is engaged in a practice which primarily involves discrimination cases. The inquiring attorney believes that, in large part, he was appointed to the Commission precisely because of his knowledge of employment discrimination law that was obtained in the course of his legal practice.

In an attempt to discover additional facts which might have bearing upon his problem, the inquiring attorney has had a discus-

sion with the Deputy Director of the Office of Human Rights concerning several matters which are pertinent to this inquiry. The inquiring attorney reports that the Deputy Director believes that the Commission presently has a sufficient number of Commissioners to enable the inquiring attorney, without disrupting the functioning of the Commission, to recuse himself from any matter that might come before the Commission in which the inquiring attorney's office had represented a complainant. In addition, the Deputy Director stated that the Office of Human Rights would not be influenced, in any way whatsoever, by the fact that a complainant before it was represented by a Member of the Human Rights Commission. Finally, the Deputy Director indicated that the Commission has no involvement in the investigation of complaints filed with the Office of Human Rights, in the decision-making processes of the Office concerning individual complaints, or in the conciliation efforts that the Office undertakes. Moreover, the Deputy Director indicated that the Office of Human Rights is to some extent free to nullify the investigation guidelines issued by the Commission, although he apparently did not elaborate.

The inquiring attorney has asked us to address eleven specific questions:

1. If he accepts the appointment as Human Rights Commissioner, must he personally cease representing any clients before the Office of Human Rights?

2. If he accepts the appointment, must his office cease representing any clients before the Office of Human Rights?

3. If he accepts the appointment, must he personally cease representing any clients before the Human Rights Commission?

4. If he accepts the appointment, must his office cease representing any clients before the Human Rights Commission?

5. If he accepts the appointment, must he cease to advise clients on the Human Rights Law of the District of Columbia?

6. If he accepts the appointment, must he cease to represent clients who submit charges to the Washington, D.C. office of EEOC that are deferred to the Office of Human Rights pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended?

7. If he accepts the appointment, must his office cease to represent clients who submit charges to the Washington, D.C. office of EEOC that are deferred to the Office of Human Rights pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended?

8. If he accepts the appointment, must he cease to represent and advise clients on any employment discrimination case that falls within the concurrent jurisdiction of OHR and EEOC?

9. Can the inquiring attorney accept the appointment if it would mean that he must withdraw as counsel for current clients who have already retained him?

10. If the inquiring attorney can accept the appointment, but must withdraw as counsel for certain clients, what obligations does he have to such existing clients to insure that they continue to be represented?

11. Can the inquiring attorney recuse himself from any matter in which he has been counsel if and when it comes before the Human Rights Commission and continue to represent clients at least before the Office of Human Rights so long as the client is informed at the outset of the relationship that counsel cannot represent the client before the Human Rights Commission?

The inquiring attorney has also offered to comply with two procedures that he believes will be sufficient to insulate him from any suggestion of impropriety. First, with respect to clients who have already retained him, the inquiring attorney proposes to continue representing those clients by giving them advice and appearing on their behalf before courts, federal agencies, and the District of Columbia Office of Human Rights. However, he is prepared to withdraw as counsel if any of those clients' cases come before the Commission, and to recuse himself from participation in such cases as a Commissioner. In such a situation he would also be willing to assist in finding suitable substitute counsel for the complainants. Second, with respect to new clients, the inquiring attorney proposes to inform all prospective clients at the outset that he does sit on the Human Rights Commission and that he, therefore, would not be able to represent them if their case were to go before the Commission. However, the attorney does propose to represent such clients before other tribunals including the Office of Human Rights.[1]

Finally, the inquiring attorney asserts that a particularly difficult situation is raised in the one case in which he presently represents a client whose case is pending before the Commission. The attorney notes that that case has been at the administrative level for approximatiey eight years. Fo much of this time, the complainant represented himself, but the inquiring attorney has represented him for the past three years—a sufficient amount of time for a substantial attorney-client relationship to have developed. Although that case is presently pending before the Commission, the attorney points out that all parties to the case agree that, because of procedural irregularities occurring before the Office of Human Rights, the case is not properly before the Commission at this time. Because he believes the Commission to lack jurisdiction, the inquiring attorney believes that a remand to the Office of Human Rights is appropriate, and has joined with the respondent in moving the Commission to so remand the case. If no such remand is ordered, the possibility of judicial review before the District of Columbia Court of Appeals exists. The inquiring attorney desires our views concerning how best to proceed in this case.

[1]Utilization of these procedures is referred to hereafter as the "proposed conduct."

Discussion

Two sections of the Code of Professional Responsibility have a significant bearing upon this inquiry. Canon 9 generally prohibits lawyers from taking actions that create even an appearance of impropriety, and Canon 5 generally prohibits lawyers from representing clients in situations where conflicting interests may interfere with the exercise of their independent professional judgment on behalf of their clients. We believe that the proposed conduct would offend the policies which underlie these ethical provisions.

I. *Appearance of Impropriety*

Canon 9 states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." EC 9-1 and EC 9-2 indicate that the purpose of this directive is to establish and preserve public trust and confidence in the legal system and to ensure its efficient operation. Consequently, EC 9-3 cautions a lawyer against taking actions that "would give the appearance of impropriety even if none exists," thereby placing considerable emphasis upon the appearance of a lawyer's behavior in and of itself. In reducing this general concern to specific requirements. DR 9-101 provides:

> (A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.
> (B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.
> (C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official. [footnotes omitted.]

Although the Rule contains only three specific prohibitions, it is evident from the very nature of Canon 9 that the specified prohibitions were not intended to be exhaustive. In fact, EC 9-2 states that "[w]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession," thereby contemplating the existence of problems not directly addressed by the Rule. We believe that in the context of this inquiry there are certain problems that contribute to an appearance of impropriety even though they are not explicitly addressed by the language of DR 9-101.[2]

The public is likely to lose confidence in the legal system when it appears that certain cases are not being decided impartially on the merits. We believe that such appearances might well exist if the inquiring attorney were permitted to continue practicing before the Commission while serving as a Commissioner. This is because the roles of partisan advocate and impartial decision

maker are fundamentally inconsistent. While serving as an advocate the inquirer would be obligated to do everything permissible to advance the interests of his clients. *See* DR 7-101. However, in his capacity as a Commissioner, the inquirer would be required to strive for a decision that was proper in objective terms. If the inquirer were serving in both capacities in the same proceeding, the impropriety would be clear. However even if the inquiring attorney were to recuse himself from acting as a Commissioner in all cases involving his own clients, there would still be a potential for abuse.

When ruling as a Commissioner in cases involving clients other than his own, the inquiring attorney could not be expected to ignore the precedential value that his rulings would have in the cases that he was handling as an advocate. Consequently, it is not unrealistic to suspect that the inquirer would approach the cases presented to him as a Commissioner with at least a slight pro-complainant bias, no matter how zealous he was in his quest for impartiality. Such a bias is potentially present whenever an advocate is appointed to a judicial or quasi-judicial post in the substantive area in which he or she practiced, but the danger is greatly increased if the appointee continues to practice after his or her appointment.

There may also be a loss of public confidence in the situation presented by this inquiry resulting from the inquiring attorney's unique advantage in asserting the claims of his clients. In theory, under our legal system, all parties present their claims to an impartial tribunal on equal footing. However, the inquiring attorney's status as a Commissioner—a peer of the decision makers—may give his clients a decided advantage. The inquiring attorney would not only be familiar with the Commission's operation in the way that an experienced practitioner would be, but he would also possess esoteric knowledge not available to the general public. During deliberations with the other Commissioners the inquiring attorney might obtain knowledge of the priorities, biases, and values of the other Commissioners that could be exploited in order to make them look with favor upon his clients' cases. In addition, the inquiring attorney would have greater access to, and perhaps greater influence with, the Commissioners deciding his cases precisely because they were his colleagues. This is the very danger that DR 9-101(C) is designed to guard against in recognition of the fact that few things can more effectively undermine public confidence in the legal system than the widespread belief that cases are being decided on the basis of personal influence rather than on their merits. Moreover, because public trust is involved, it is the appearance of impropriety, rather than any actual abuse, that is important.

We believe that the situation described in the present inquiry is fraught with potential appearances of impropriety, and we would not hesitate to find the proposed conduct unethical if the considerations discussed thus far were the only ones at issue. However, other factors should be considered before resolving the issues raised by this inquiry.

II. *Balancing of Competing Considerations*

The problems posed by this inquiry stem from the fact that the inquiring attorney is engaged in an employment discrimination practice but, ironically, this is precisely what makes him particularly well-suited to serve as a Commissioner. The inquirer has stated, and we have assumed, that he was appointed to the Commission because of his knowledge of employment discrimination law. There is presently a lack of such expertise on the Commission, even though the resolution of employment discrimination claims constitutes an essential part of the Commissioner's functions.

Because Human Rights Commissioners are neither salaried nor full-time employees. Commissioners must continue to engage in their occupations while holding office in order to earn a living. As a result, the problems that accompany the appointment of the inquiring attorney would be present in most instances in which someone with a strong working knowledge of employment discrimination law was appointed. If these problems are allowed to control, appointees such as the inquiring attorney will be forced to either sacrifice their appointments or abandon a significant portion of their practices. Given such a choice, many might decline to accept their appointments.

In order to encourage appointees to accept positions on the Commission, they should not be forced to abandon any portion of their practices unnecessarily. However, we believe that the concerns underlying Canon 9 are entitled to great deference, and that they clearly preclude the inquiring attorney from representing his clients in any case before the Commission. However, we do not believe that the inquiring attorney is required to give up his employment discrimination practice completely. The attorney may ethically continue to provide general advice to clients about matters in which he is not personally involved as a Commissioner, and he may continue to represent clients who elect to pursue their judicial remedies in federal and District of Columbia courts. Once it is realized that Human Rights Commissioners are not full-time, salaried employees, any appearance of impropriety that might otherwise accompany those activities is greatly reduced and outweighed by our societal interest in attracting Commissioners with needed expertise.

The most difficult question presented by this inquiry concerns how to balance the competing interests with respect to the representation of clients before the Office of Human Rights, the investigative arm of the Commission. If the inquiring attorney is prevented from appearing before the Office of Human Rights, the adverse impact on his practice will be substantial. Moreover, because recourse to both federal and District of Columbia administrative remedies would be precluded by such a determination, the impact might well be sufficient to cause the inquiring attorney, and others with similar expertise, to refuse to accept Commission appointments. On the other hand, the vision of a Commissioner practicing before the agency whose actions he or she reviews is a very troubling one.

The inquiring attorney asserts that contact between Commissioners and members of the staff of the Office of Human Rights is very minimal. Commissioners do not have supervisory authority over Office staff members, and they do not participate in investigations or conciliation efforts. Moreover, because the Office staff presents evidence to a hearing examiner—who is rarely a Commissioner—who then prepares a report on which the Commissioners base their decision, the Commissioners and the Office staff do not even have significant contact with each other during the resolution of individual cases. Nevertheless, no matter how significant these particular facts may be in actuality, they are not generally known to the public. Consequently, they do nothing to reduce the *appearance* of impropriety that would result from the proposed conduct.

By outward appearances, the Commission and the Office of Human Rights are intimately connected. The Office is the investigatory arm of the Commission. Complaints issued by the Office are issued in the name of the Commission. Office conciliation agreements have the force of Commission orders. Hearing officers are Commission employees. And the final administrative tribunal to act on charges filed with the Office is the Commission. Because the Office and the Commission appear to be so intimately connected, we believe that the balance between the competing interest here must be struck in favor of the policies which underlie Canon 9, and that the inquiring attorney may not ethically represent clients whose cases are before the Office of Human Rights. While this may mean that the Commission will continue to lack needed expertise, this problem is one that must be solved by the District of Columbia government through the creation of full-time, salaried Commission positions.[3]

[3]To the extent that focusing upon a particular Disciplinary Rule might be considered necessary, we believe that, in the absence of extraordinary circumstances, whenever an individual appears as an advocate before a tribunal on which he or she also serves as a decision maker, there is an implication that the advocate is able to influence the tribunal through utilization of factors not related to the merits of the case. Such an implication is directly prohibited by DR 9-101(C). See also DR 8-101(A)(2) and EC 8-8.

III. *Conflicts of Interest*

Although we believe that Canon 9 requires the inquiring attorney to cease practicing before the Commission and the Office of Human Rights if he accepts his appointment, we do not believe that Canon 9 prevents him from practicing before federal courts or agencies. However, there is a serious potential for conflicts of interest which must be avoided. Canon 5 states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." EC 5-1 emphasizes that a lawyer's judgment should be exercised *"solely* for the benefit of his [or her] client and free of compromising influences and loyalties." [Emphasis added, footnote omitted.] *See also* EC 5-2. Consequently, DR 5-101(A) states:

> (A) *Except with the consent of his client after full disclosure,* a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client *will be or reasonably may be* affected by his own financial, business, property, or personal interests. [Emphasis added, footnote omitted.]

The standard set out is one of "reasonableness," and application of the Rule is subject to consent of the client after full disclosure.[4]

In the present situation, there is a possibility that the interests of the client represented by the inquiring attorney in an employment discrimination case would be jeopardized by the fact that the attorney is a Human Rights Commissioner. If, for example, the inquirer were to accept cases before a court or the EEOC, only to withdraw as counsel whenever one of his cases were deferred to the Office of Human Rights, or somehow made its way to the Commission, undersirable results could follow. The withdrawal could prejudice the client by forcing him or her to find and rely upon new counsel having less familiarity with the case. Although, as discussed below, the inquiring attorney would be required by DR 2-110(A)(2) to help minimize any such prejudice to his clients' rights, the disruption caused by withdrawal could, nevertheless, be substantial. This is especially true in cases such as the one which the inquiring attorney presently has pending before the Commission, where the attorney-client relationship has developed over a long period of time, and where procedural irregularities with which the inquiring attorney himself is most familiar will be relevant to future proceedings.

A potential conflict would also exist between the inquiring attorney's own financial interests and the interest of his clients. Although alternative judicial and administrative remedies are available to employment discrimination complainants, the inquiring attorney would have a financial incentive to advise his clients to pursue their judicial remedies. In this way the danger of required withdrawal, and the concomitant loss of fees by the inquiring attorney, would be reduced since the case would never be presented to the Commission or the Office of Human Rights. While pursuit of judicial remedies could potentially result in higher attorney's fees for the inquiring attorney, such a course of action is at odds with the inquirer's own statement that his clients generally have more success if they pursue their administrative remedies. This seems to be well within the concerns underlying the conflict-of-interest provisions of DR 5-101 (A).

We believe that the dangers of injury to a client's interests resulting from the fact that he or she is represented by a Human Rights Commissioner are serious dangers. However, there are certain factors which reduce these dangers somewhat under the facts of this particular inquiry. Although the inquiring attorney would have some financial incentive to pursue a course of action that could be inconsistent with his client's best interests, we note that attorneys are compensated in many employment discrimination cases through judicial or administrative awards of attorney's fees. Where this is the case, the financial interests of the lawyer and the client correspond more closely since the lawyer's fee may depend upon whether the client prevails. Consequently, the independence of the lawyer's judgment is more likely to be preserved. In addition, the conflict-of-interest provisions of DR 5-101(A) are expressly made subject to waiver by the client after full disclosure. Similarly, we believe that after full disclosure, a client should be free to retain the attorney of his or her choice despite the disruption that could ensue from the possibility of subsequent withdrawal. However, if the inquiring attorney accepts his appointment to the Commission, he must take care to advise future clients of the potentially conflicting interests to which he will be subject, and to accept employment only with the client's informed consent.

IV. *Additional Concerns*

We believe that we should also address several additional concerns that are within the scope of this inquiry. The specific questions posed by the inquirer raise the issue of whether the inquiring attorney's future law partner can handle cases from which the inquiring attorney is disqualified as a result of becoming a Commissioner. Under DR 5-105 (D) of the American Bar Association's Code of Professional Responsibility, as amended in February 1974, the inquiring attorney's partner would automatically be prohibited from handling any case that the inquiring attorney was prohibited from handling by any disciplinary rule. However, the version of DR 5-105(D) that is in effect in the District of Columbia imputes such disqualification to an attorney's partners or associates only when the attorney is prohibited from handling a case by the conflict-of-interest provisions of Canon 5. Since our determination that the inquiring attorney may not handle cases before the Commission or the Office of Human Rights is based upon the appearance-of-impropriety considerations that underlie Canon 9, the District of Columbia version of DR 5-105(D) does not directly apply. Nevertheless, we believe that Canon 9 itself precludes the inquiring attorney's partner from handling any cases that the inquiring attorney is ethically prohibited from handling. In a two-person law office, one attorney cannot effectively be insulated from interaction with, or influence upon, the other attorney. Consequently, there would be as strong an appearance of impropriety if the law partner of a Commissioner handled a case before the Commission as if the Commissioner handled the case personally.

Because of our determination that the inquiring attorney may not appear before the Commisison or the Office of Human Rights, in order to accept the appointment, the inquiring attorney will be required to withdraw in cases that he presently has pending before those agencies. However, we must emphasize that whenever an attorney withdraws, great care must be taken to avoid disruption and prejudice to the rights of the client. DR 2-110(A), which is designed to guard against these dangers, states:

> (1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
> (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.
> (3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

We believe that these directives should be strictly complied with whenever the inquiring attorney withdraws from a case.

Although withdrawal is not always permitted under DR 2-110(C), we assume that the inquiring attorney's clients would consent to withdrawal under DR 2-110(C)(5).

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[3]It should be noted that Canon 5(F) of the American Bar Association's Code of Judicial Conduct flatly prohibits judges from practicing law, but Part A(2) of the section of the Code entitled "Compliance with the Code of Judicial Conduct" contains an exception to this prohibition for part-time judges. However, Part A(2) does preclude part-time judges from practicing before courts on which they serve, or over whom they have appellate jurisdiction. If that provision were in force in the District of Columbia, it could be argued that it would, by analogy, also prevent the inquiring attorney from practicing before the Office of Human Rights.

[4]In addition, DR 5-105 prohibits representation of multiple clients where potential conflicts of interest exist. That prohibition is relevant here by analogy where the inquiring attorney wishes to "represent" both his clients and the Commission.

Even in the absence of consent, we do not believe that the client's desire for continued representation by the inquiring attorney could force the attorney to decline the appointment. It is conceivable that in some cases the hardship resulting from withdrawal could be so great that the attorney would ethically be required to continue the representation in spite of the appearance of impropriety resulting from his acceptance of a Commission appointment. However, we decline to render an opinion on this difficult issue in the absence of a particular factual setting. Nevertheless, we do believe that the inquiring attorney should make every effort to obtain his clients' consent to withdraw before he is sworn in as a Human Rights Commissioner.

Finally, we believe that we should address the question of whether the inquiring attorney may, after accepting his appointment, represent clients before the District of Columbia Court of Appeals in actions seeking review of Commission decisions. Some appearance of impropriety would result from such representation since, at the very least, it would be unseemly for a Commissioner to argue, as an advocate, the soundness of the decisions made by a tribunal on which he or she sits as a decision maker. Even if the inquirer were arguing before the Court of Appeals in a case on which he did not act as a Commissioner, problems might exist. For example, the inquiring attorney could easily be placed in the position of having to argue the meaning and scope of another Commission precedent in which he *was* involved as a Commissioner. This fundamental inconsistency between the roles of advocate and impartial decision maker creates a tension that would be better avoided. As a practical matter, the problem should not arise frequently, since we believe that the inquiring attorney is precluded from handling administrative cases that would ordinarily be appealed to the District of Columbia Court of Appeals. However, if the attorney were to accept employment in cases once they reached the Court of Appeals level, the implication that he had been retained because of his status as a Commissioner would be so strong that Canon 9 would preclude such employment at the appellate level as well.

Finally, the inquiring attorney represents one client whose case is presently pending before the Commission. The inquirer also states that the case may well be appealed to the District of Columbia Court of Appeals where that Court will be asked to decide whether further proceedings in the case should properly occur before the Commission or the Office of Human Rights. Since we believe that the inquiring attorney cannot properly appear before any of these tribunals, it is our view that he should withdraw as counsel in that case if he accepts the appointment.[3]

Responses to Specific Questions

In light of the considerations discussed above, we have arrived at the following answers to the eleven specific questions posed by the inquiring attorney:

1. If the inquiring attorney accepts the appointment as Human Rights Commissioner, he is ethically required to cease representing clients before the Office of Human Rights.

2. If he accepts the appointment, his office is ethically required to cease representing clients before the Office of Human Rights.

3. If he accepts the appointment, he is ethically required to cease representing clients before the Human Rights Commission.

4. If he accepts the appointment, his office is ethically required to cease representing clients before the Human Rights Commission.

5. If he accepts the appointment he need not cease advising clients on the Human Rights Law of the District of Columbia.

6. If he accepts the appointment, he is ethically required to cease representing clients who submit charges to the Washington, D.C. office of the EEOC that are deferred to the Office of Human Rights pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended, in matters pending before the Office of Human Rights.

7. If he accepts the appointment, his office is ethically required to cease representing clients who submit charges to the Washington, D.C. office of the EEOC that are deferred to the Office of Human Rights pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended, in matters pending before the Office of Human Rights.

8. If he accepts the appointment he need not cease representing and advising clients on employment discrimination cases that fall within the concurrent jurisdiction of the Office of Human Rights and the EEOC, except that he may not ethically represent clients whose cases are pending before the Office of Human Rights, the Human Rights Commission, or the District of Columbia Court of Appeals.

9. The inquiring attorney may accept the appointment even though he might be required to withdraw as counsel for current clients who have already retained him, but he may ethically do so only if precautions are taken to prevent disruption or prejudice to the interests of those clients resulting from withdrawal. We do not address the question of whether withdrawal would be ethically permissible in cases involving extraordinary hardship for his clients except to note that the possibility of such hardship does not prevent him from accepting the appointment.

10. If the inquiring attorney is required to withdraw as counsel for certain clients, he is ethically obligated to adhere to the requirements set out in DR 2-110(A), and to take whatever other precautions are necessary to prevent the clients' interests from being prejudiced, including all reasonable efforts to secure suitable substitute counsel.

11. The inquiring attorney may not ethically continue to represent clients before the Commission or the Office of Human Rights, or the D.C. Court of Appeals, but he may continue to represent clients before other tribunals, provided that he fully informs the clients at the outset of the relationship that he will have to withdraw if their cases are ever referred to any of those tribunals, and provided that the clients agree to representation on that basis.

Conclusion

It is our opinion that the inquiring attorney is ethically required to cease representing clients in employment discrimination cases before the Human Rights Commission, the Office of Human Rights, and the District of Columbia Court of Appeals if he accepts his appointment to the Commission. The appearance of impropriety created when an individual serves both as a decision maker and an advocate with respect to the same tribunal is too great to permit the inquiring attorney to continue practicing before the Commission if he accepts the appointment. Moreover, the Office of Human Rights, and the District of Columbia Court of Appeals when it reviews Commission decisions, are so closely related to the Commission that the inquiring attorney must also cease his practice before those tribunals if he accepts the appointment in order to avoid a similar appearance of impropriety. Finally, the inquiring attorney's office is also precluded from handling any cases that the inquiring attorney is precluded from handling as a result of his appointment. The inquiring attorney may continue to handle cases before other tribunals if care is taken to avoid conflicts of interest and if his clients consent to representation after being full informed of the factors which could lead to such conflicts of interest or which could disrupt their representation. We realize that this result will make it difficult for the Commission to obtain needed expertise in the area of employment discrimination law, but this problem can best be remedied by the District of Columbia government through the creation of full-time, salaried positions on the Human Rights Commission.

Inquiry No. 78-3-38
April 25, 1978

Opinion No. 49

DR 5-105(A), 5-105(C); EC 5-15; EC 5-16—Dual Representation—Drafting of Agreements Between Two Clients

[3]This conclusion assumes that the client's rights will not be unduly prejudiced by withdrawal. As noted above, we have not attempted to decide whether withdrawal would be required if extraordinary prejudice to the interests of the client would result.

We have been asked to advise whether it is ethically proper for a law firm that represents corporation *A* as its general counsel also to be retained by corporation *B*, where the corporations will be involved in closely related businesses and the law firm will be called upon, among other things, to prepare agreements, including a management and a financing and development agreement, to be entered into by the corporations with each other. Corporation *A* is involved in the business of managing hospitals and corporation *B* will be organized as a non-profit corporation for the purpose of constructing and operating a hospital.

The law firm proposes to render for corporation *B* a typical variety of services, including incorporation, submissions to the Internal Revenue Service, negotiations with interested parties other than corporation *A* and the preparation of documents associated with the sale of bonds.

The law firm's proposed representation of corporation *B* concerning matters other than the preparation of the agreements between corporation *A* and corporation *B* clearly does not raise any ethical problems. With respect to the agreements, the law firm states that it would disclose fully its role in preparing such agreements to the several principals and to any other entities that may be involved in the underlying transactions. The agreements consist of standard agreements previously prepared by the law firm for corporation *A*, which are to be modified based upon the unique circumstances of the current transactions. The principles of the corporations have already negotiated the general terms of the agreements.

We conclude that the law firm's representation of both corporate clients in respect of these agreements would be proper under the Code of Professional Responsibility. The general applicable rule in this situation is set forth in DR 5-105(A) as follows:

> "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C)."

DR 5-105(C) provides that multiple representation may be undertaken where (i) "it is obvious" that the attorney "can adequately represent" each client's interests, and (ii) each client "consents to the representation after full disclosure" of the possible consequences of the multiple representation. These disciplinary rules are to be read in the light of EC 5-15, which states as an ethical consideration that an attorney who is requested to represent multiple clients with "potentially differing interests" should resolve all doubts against the propriety of the representation."

The probability that differences will arise between the parties in the course of reducing the agreements to writing is high enough that we have to conclude that it is likely, in terms of DR 5-105(A), that the law firm's exercise of independent professional judgment on behalf of one client or the other will be affected by undertaking the dual representation. The question, then, is whether DR 5-105(C) is or can be satisfied.

The reconciliation of DR 5-105(A) and 5-105(C) is difficult. If the exercise of independent professional judgment in behalf of a client is equated with adequate representation of the client, it is hard to understand how it can ever be "obvious" that a lawyer can "adequately represent the interest of each client" in a case in which "the exercise of his independent professional judgment in behalf of" one or the other "is likely to be adversely affected."[1] If DR 5-105(C) is read literally, it requires *both* that it be obvious that the lawyer can adequately represent each client and that the lawyer have the informed consent of both clients before the lawyer can undertake a dual representation that otherwise would be barred by DR 5-105(A). If adequate representation means representation in which the exercise of the lawyer's independent judgment is not likely to be impaired, the first requirement of DR 5-105(C) logically can never be satisfied, and the question whether informed consent has been given is never reached. Former Canon 6, the predecessor to DR 5-105(C), seemed to allow dual representation on the basis of informed consent alone. There are suggestions in the Ethical Considerations under the present Canon 5 that consent without more may suffice to allow dual representation in some cases. EC 5-16. Nevertheless, the Committee does not consider itself justified in ignoring the apparent first requirement of DR 5-105(C) or in reading the "and" of DR 5-105(C) to mean "or" so that *either* an obvious ability to represent each client adequately *or* informed consent would suffice to remove the bar of DR 5-105(A).

In the consent provision of DR 5-105(C) can be found the makings of a formula for reconciling DR 5-105(A) and DR 5-105(C). The requirement of DR 5-105(C) is that each client consent "after full disclosure of the effect of" the dual representation "on the exercise of" the lawyer's "independent professional judgment on behalf of each." It is assumed, in other words, that consent may be given even though, to the knowledge of the client, the exercise of the lawyer's independent professional judgment may be impaired; it is assumed that it is not obvious that the exercise of his judgment will not be impaired. Unless DR 5-105(C) was deliberately drafted to be a nullity, this must mean that "adequately represent" in the first part of DR 5-105(C), means something other than to represent with unimpaired professional judgment. What it has to mean is that the representation will be adequate to the purposes of the clients in the light of the understanding of the nature of the representation that is necessarily implied by each client's consent to the dual representation after the disclosure to each client of how the duality of the representation will affect the lawyer's performance.

In this case the law firm may fairly regard it as obvious that it can adequately represent both clients in the sense in which the phrase is apparently used in DR 5-105(C). Here the parties apparently would obtain from the firm just the representation that they think they need and that they want. If, in the course of reducing to writing the agreements that have already been concluded in substance, unprovided-for contingencies or other sources of remaining disagreement or incomplete agreement are uncovered, the law firm can advise both clients of the problems and refer them to the principals for resolution. The law firm can attempt, in the drafting of the agreements, to allocate fairly benefits and burdens of the bargain whose existence or nature may not have been obvious to the lay principals, informing both clients of what it has done. If as a result the parties have jointly a professional adviser and learned scrivener instead of each having a negotiating champion, that is because the adviser/scrivener and not the champion is what each has said it wants; the law firm's services as adviser/scrivener constitute representation adequate to the desires and purposes of the parties.[2]

The clients should be advised that if the point is ever reached where reconciliation of differences on the basis of the law firm's advice is impossible, it can probably act for neither in any ensuing negotiations or litigation. The lawyer as advocate is almost certainly less free than the lawyer as adviser to represent clients whose interests conflict, even with their consent. Indeed, EC 5-15 says that "[a] lawyer should never represent in litigation clients with different interests...."

We conclude, however, that the law firm can represent adequately both corporations

[1]The same problem of verbal reconciliation would exist if DR 5-105(A) were amended as the American Bar Association has amended it to require a lawyer to decline employment not only if thereby the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected but also "if it would be likely to involve him in representing differing interests." "Differing interests" are defined to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client...." Thus, the inclusion of "differing interests" in DR 5-105(A) seems to accomplish nothing other than to introduce into the disciplinary rule the uncertain concept of "loyalty." Presumably if a lawyer's loyalty to a client is adversely affected, the lawyer may be less able than he otherwise would have been adequately to represent the interest of the client, and so the problem of satisfying DR 5-105(C) in a case in which DR 5-105(A) applies remains.

[2]The desirability in many cases of having a single lawyer prepare a commercial or financial contract is urged in Paul, A New Role for Lawyers in Contract Negotiations, 62 A.B.A.J. 93 (1976).

in the preparation of the agreements and that such representation if consented to after the disclosure called for by DR 5-105(C) is ethically permissible.

Inquiry No. 77-9-19
June 27, 1978

Opinion No. 50

DR 5-101; DR 9-101 — Participation by Agency General Counsel in Matters Involving Parties Represented by Law Firm with Which Spouse is Associated—Conflict of Interest; Appearance of Impropriety

Inquiry has been made by an attorney who is serving as General Counsel of a federal independent regulatory agency concerning the course of action he should follow regarding matters before the agency in which the inquiring attorney's spouse is employed as a part-time associate.

The general counsel who makes the inquiry supervises the activities of his office in representing the agency in the federal courts when agency action is challenged; these duties are supervisory in nature, and seldom involve direct personal participation, except on cases of unusual importance. The general counsel also responds to requests for advice from members of the regulatory agency and its senior staff officials. Finally, he has responsibilities for supervising the legislative activities of the agency; this latter function, however, is largely discharged by a subordinate with specific responsibility for such legislative matters.

The wife of the general counsel is also an attorney, and is an associate with a large Washington law firm. Her area of practice is specialized, and has no connection whatsoever with practice before or matters relating to the regulatory agency which her husband serves as general counsel. There is, therefore, currently no possibility that she will be personally involved in any matter which comes before her husband requiring action in his official capacity.

The firm with which the wife is associated, however, represents a number of clients, both before the regulatory agency and in court proceedings in which the agency is a party. In the normal course of his duties the general counsel would be called upon to take official action, by way of advice, decision or otherwise on matters before the agency involving clients represented by the firm where his wife serves as a part-time associate. Less frequently, but occasionally, he might be called upon to take official actions involving court litigation in which both the agency and clients represented by the firm employing his wife are involved as adversary parties.

The inquiring general counsel indicated in his original inquiry that he wishes to avoid any possible impropriety which might arise out of official action on his part involving matters affecting the interests of clients represented by the firm which employs his wife. Pending advice on the subject, he has voluntarily established the practice of disqualifying himself from acting on any matters affecting the interests of clients represented by the firm which employs his wife.

This practice, however, poses substantial difficulties for the inquiring general counsel, for the matters as to which he is forced to disqualify himself include some of the most important matters coming before the agency. In a supplement to his original inquiry, the general counsel suggests a procedure which, in lieu of blanket disqualification, would involve notifying the members of the agency and all parties of his responsibilities and the situation concerning his wife's employment with counsel for a party. He suggests that, if no party objects (and presumably there is no objection from the agency itself, his "client"), he would not feel compelled to disqualify himself. If a party objects, he proposes either to disqualify himself or explain in writing why he is not doing so.

The inquirer also notes that some of his responsibilities involve advice to the agency in its quasijudicial role. For example, the rendering of advice to members of the agency with respect to the proper course of action in a matter yet undecided partakes of judicial action, as distinguished from official action in matters where the agency is in an adversary posture with respect to other parties. The latter situation would arise where, decision having been rendered by the agency, parties are challenging the decision in the courts.

Preliminarily, it may be noted that the kind of husband/wife dual professional relationship which is involved in this inquiry has the potential of raising problems under at least three of the Canons: Canon 4, requiring attorneys to preserve the confidences and secrets of a client; Canon 5, requiring attorneys to exercise independent professional judgment on behalf of a client; and Canon 9, requiring attorneys to avoid "even the appearance" of impropriety.

This opinion will not address the problems of confidences implicated by Canon 4, except to note that where spouses are both attorneys and employed by firms or agencies whose interests are sometimes in conflict, exceptional care must be exercised to assure that the seemingly routine discussion of professional experiences between them does not result in improper disclosures of the kind with which Canon 4 is concerned. In this regard, the Committee shares the concern with possible violations of DR 4-101 which was reflected in the comments of the ABA Committee in Formal Opinion 340 (1975).

With respect to possible violations of DR 5-101 and DR 9-101, it is useful to note that, at least in cases not involving government attorneys, any potential disqualification arising under DR 5-101 is susceptible to waiver by the client after full disclosure. See DR 5-101(A).[1] Waiver by a client, however, especially in cases involving government attorneys and implicating the public interest, cannot in and of itself remove any appearance of impropriety which would invoke DR 9-101.

With this distinction in mind, it seems nonetheless useful to examine the problem of disqualification under Canons 5 and 9 together. The potential difficulty under Canon 5 arises from the possibility that employment of the wife by the law firm would affect the judgment of the general counsel, depriving the government, his client, of his undivided loyalty and independent judgment. The potential difficulty under Canon 9 arises because it might appear to parties before, or in litigation with the agency, or to the bar or the public at large, that it would be improper for the general counsel to have any official role where the interests of clients represented by the firm which employs his wife are implicated.

An initial question is whether a *per se* rule of disqualification is required where there is a juxtaposition of one spouse's law firm against the interests of the agency in which the other spouse serves as attorney. Or, put differently, should there be an examination of the facts involved in each such situation, with the results turning on such facts rather than upon a "blanket" or *per se* requirement for disqualification.

The blanket disqualification has the virtue, shared with most *per se* rules, of ease of application. On the other hand, it shares with other forms of *per se* rules the defect of treating identically situations involving substantial factual dissimilarities and covering a wide range of circumstances.

It is appropriate to note two matters of public policy which bear on a proper resolution of the questions raised by the inquirer. *First*, it is undesirable for public officials with significant responsibilities to be disabled from discharging important portions of those responsibilities, and, while all attorneys must follow the ethical restraints imposed by the various disciplinary rules, the undesirability of sweeping disqualifications may be an appropriate factor to be weighed in interpreting the normally general language of a Canon, ethical consideration or disciplinary rule. *Second*, it is a matter of common knowledge that more and more women are becoming members of the bar, and that more and more attorneys are married to

[1]Certain opinions of the American Bar Association Ethics Committee (beginning with Formal Opinion 16 (1929) arising under Canon 6, the forerunner of DR 5-101(A)), held that a government attorney could not seek consent where he, his partners, or his associates represented interests in conflict with his official duties. *See also* American Bar Association Committee On Professional Ethics Opinion 34, 142 and 192. These opinions would appear to be derived more from potential appearance of impropriety under Canon 9 than from the principles with respect to waiver underlying DR 5-101(A). However, it does not appear that such a rule, involving government attorneys who maintain a private practice affiliation while performing government duties, should be extended automatically to cases involving spouses employed in different firms or other legal occasions.

other attorneys. It would be unfortunate and undesirable if the rules with respect to disqualification imposed unnecessarily severe restraints on one or both such spouses whose firms or government agencies may occasionally be in an adversary posture.

This Committee has not previously had occasion to address the issues raised by this inquiry. However, in Formal Opinion 340 (1975), the ABA Committee examined generally the question of disqualification where attorney spouses represent different interests, noting that one such situation arises when one spouse is employed by a government agency and the other spouse with a law firm. The ABA Committee, while noting the need for sensitivity to the ethical problems potentially raised by such spousal-professional relationships, declined to interpret DR 5-101 as requiring automatic disqualification. The Committee noted, however, that circumstances could arise in which disqualification would be required. The ABA Opinion made no reference to potential problems arising under Canon 9.[2]

The range of potential situations involving the representation of conflicting interests by spouses or their firms or agencies is broad. At one extreme is the situation in which husband and wife are personally involved on opposing sides of the same adversary matter. Such a situation would normally raise sufficient difficulties with questions of undivided loyalty to require disqualification under DR 5-101. The requirement for disqualification, insofar as Canon 5 is implicated, can be waived by the fully informed consent of the client. DR 5-101(A). However, the direct adversary role of husband and wife in the same matter raises such serious questions of improper appearances as to suggest that such situations would not be consistent with the spirit of Canon 9 even if all clients involved were to give consent.

At the other extreme of the dual spouse/attorney scale are those situations in which the organizations of the spouses (i.e., firm or government agency or other form of multi-lawyer unit) are in adversary roles, but neither spouse has any involvement in the matter in question. In such situations any question of divided loyalty by those directly involved in the adversary relationship, based merely upon the presence in the firm, agencies or other units of wholly uninvolved spouses, seems remote and insubstantial. It appears to the Committee that no automatic disqualification would normally arise in such circumstances.[3] Hence, no need to seek consent would arise with respect to DR 5-101. Similarly, the remoteness of the spouses to the adversary relationship suggests that no appearance of impropriety arises under Canon 9. While there are always those who will find a hint of impropriety in any situation involving dual attorney-spouses, it does not appear that such would be the reaction of any significant portion of the bar or the public at large, if informed of the circumstances.

Situations falling in between direct adversary relationships between attorney spouses, on the one hand, and total noninvolvement in the matter at the other, present more difficult problems, not in the least because of the range of factual situations which can be involved in such intermediate cases. The general situation is easy enough to describe: There is an adversary relationship between organizations (firms, agencies, etc.) of two attorney spouses. One spouse is uninvolved in the matter giving rise to the adversary relationship, while the other is, or seeks to be, involved.

Within this general description there is room for considerable variation in detail. Taking the case presented by the inquiring attorney, for example, his spouse is wholly uninvolved in the area of practice which involves representation before or against the inquiring attorney's agency. Other situations can be reasonably postulated, however, where the spouse works generally in the area of practice before the agency, but is uninvolved in a particular matter where the question of potential disqualification arises. In this latter situation, the question of disqualification is more substantial because the nongovernment spouse is not insulated from the firm's practice before the agency generally, and has a much higher degree of knowledge of, and interest in major matters before the agency, whether or not personally employed to represent clients in such matters.

In the view of the Committee, these intermediate situations do not lend themselves to a requirement for *per se* disqualification.[4] Neither do they lend themselves to a declaration that disqualification under Canon 5 or 9 or both may never be required. Each situation must be resolved on its particular facts. The nature of the responsibilities of the two spouses, their areas of practice, the closeness or remoteness of their activities to the matter raising the issue of disqualification, the nature and magnitude of any financial interest of either spouse in the outcome, and other appropriate factors should be examined. The resolution should include appropriate consideration of the policy considerations adverted to above: (1) the undesirability of imposing broad disqualifications upon government officials, thus placing a barrier between them and much of what would otherwise be their normal duties; and (2) the need to avoid unduly restricting the employment opportunities of either spouse or imposing other unreasonable limitations on attorneys who are married to other attorneys.

Turning to the specific inquiry involved here, it has already been indicated that the automatic disqualification rule which the agency general counsel has been following essentially turns the case into one where neither spouse is involved in the matters where the organizations may have an adversary relationship. If this policy were pursued, no further action by the general counsel would appear to be called for.

The inquirer has suggested, however, in his supplemental inquiry, the possibility of pursuing a less stringent practice than has heretofore been employed—informing all involved parties (including the agency itself) of the facts involving his wife's employment with the firm representing clients in a matter before or against the agency, and, if no party objects, not disqualifying himself.

So far as DR 5-101 is concerned, it would appear that the fully informed consent of the agency should be allowed, as it would in a normal non-government client situation, to operate as a waiver of any disqualification which would otherwise arise.[5] This does not, however, dispose of considerations arising under Canon 9. At the outset, it should be noted that there is no disciplinary rule under Canon 9 at present which directly or by implication deals with the situation which is presented by the inquirer. However, ECs 9-1, 9-2, and 9-6, which generally require the promotion of public confidence in the legal profession and exhort lawyers to avoid both impropriety and the appearance of impropriety, are relevant.

Under most circumstances, it would appear that forthright notice of the husband-wife relationship and the nature of the wife's relationship to the matter in question, coupled with an uncoerced waiver of objection by every party, should be sufficient to negate any implication of impropriety or apparent impropriety in the minds of those who are informed of the circumstances. There may be situations in which, for reasons which cannot even be speculatively postulated by the Committee at this time, there would be an element of implied coercion on a party to waive an objection, but such situations would likely be rare, if not nonexistent. Accordingly, in the view of the Committee, the alternative future procedure proposed by the inquiring general counsel would generally appear appropriate where no party ob-

[2]The ABA Opinion appears to reflect a more flexible fact-oriented approach to the spousal disqualification problem than some state bar ethics committee opinions. See generally, Note, Legal Ethics—Representation of Differing Interests by Husband and Wife: Appearances of Impropriety and Unavoidable Conflicts of Interest? 52 Den. L.J. 735 (1975).

[3]There may conceivably be special circumstances where a different view would be indicated.

[4]It should be noted that in situations involving close relatives other than spouses, *per se* disqualification has not been required. *See e.g.*, ABA Formal Opinion 340 (1975); New Jersey State Bar Association Opinion 136 (1968), *cited in* O. Maru, Digest of Bar Association Ethics Opinions 237 (1972) (a lawyer whose uncle is a member of a municipal planning board may serve as attorney for the board); Missouri Bar Administration Opinion 48, *cited in* O. Maru, Digest of Bar Administration Ethics Opinions 168 (1970) (a father may act as defense counsel in a case in which his son is acting as prosecuting attorney).

[5]See note 1, *supra*.

jects, and the agency also consents through an appropriate mechanism, such as an agency minute specifically recording the vote of agency members.

More difficult is the situation in which some party objects. Such an objection cannot alter the underlying factual situation in which the wife is wholly uninvolved in her firm's practice before or against the agency. On the other hand, it removes the element of unanimous consent on the part of those directly affected which is an important part of the process of negating any appearance of impropriety. The question arises whether, where such an objection is present, the inquiring general counsel should routinely disqualify himself, or whether, as he suggests, he examine the nature of the objection and either disqualify himself or explain in writing his reasons for not so doing.

There are obvious advantages, similar to those involved in *per se* rules generally, for following an automatic disqualification in such circumstances. Yet, if a party may object for no reason other than the existence of the wife's employment under the circumstances involved here, it appears that the objection process could be subject to abuse. Furthermore, a distinction should be made between those circumstances in which the general counsel is functioning in his adversary role as counsel to the agency in litigation, or in his role as advisor to the agency members and key agency staff in discharging their quasijudicial responsibilities.

If, for example, the general counsel is supporting the agency's position in litigation against various interests, including one or more represented by his wife's firm, it is difficult to perceive how his wife's employment could affect his role as an adversary in a manner which would suggest an appearance of impropriety. On the other hand, if the agency *shares* a position with interests represented by the wife's firm, and the objecting party is on the opposing side, there is a potential appearance of impropriety presented. However, in all of the situations involving litigation in the courts to which the agency is a party, there is a judge (or panel of judges) available to examine questions of disqualification. In the view of the Committee, referring any objections to the court in question presents the most appropriate mechanism for settling the matter. Furthermore, any party would in any event have access to the court to raise its objection, a fact which further counsels resort to the court for resolution.

No similar mechanism is available where the general counsel is acting in his role as advisor to the agency members or key staff. In view of the quasi-judicial nature of the duties involved in such situations, and in the absence of definitive guidance in the Code of Professional Responsibility, it is useful to examine the Code of Judicial Conduct, Canon 3, of which provides:

Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

One of the commentaries on Canon 3(C) comes closer than any other provision of the Code of Professional Responsibility or the Code of Judicial Conduct to the situation presented by the inquirer:

> The fact that a lawyer in a proceeding is affiliated with a firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that 'his impartiality might reasonably be questioned' under Canon 3C(1), or that the lawyer-relative known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceeding' under Canon 3(C)(1)(d)(iii) may require his disqualification.

Thus, under similar circumstances arising in a judicial context, the Code of Judicial Conduct eschews automatic disqualification, resorting to an examination of the circumstances.[6]

The Committee believes that the principles underlying the Code of Judicial Conduct provide an appropriate basis for approaching problems faced by the general counsel in his quasi-judicial advisory role. While recognizing that Canon 3(C) speaks of a judge "disqualifying himeself," which is comparable to the procedure which the general counsel proposes to invoke in the case of an objection, the Committee believes that it is better practice, where the agency itself is available to make determination, for the general counsel to report the facts to the agency for final resolution of the objection. The agency bears ultimate responsibility for the actions taken by the general counsel in providing counsel to it, and is entitled to pass upon objections by parties to his participation as advisor to the agency on a particular matter. Of course, the objecting party should be afforded an opportunity to make its objection and the basis for it known directly to the agency prior to its determination.

Inquiry No. 78-1-1
June 27, 1978

[6]Canon 3(D) of the Code of Judicial Conduct permits a disqualification which would otherwise be required by Canon 3 to be waived by a written "remittal" signed by all parties. This is analogous to the "unanimous consent" waiver discussed *infra* at 13.

Opinion No. 51

DR 2-103(E), EC 2-8—Recommendations of a Lawyer by Another; **DR 5-105(A) & B; EC 5-1, 5-14, 5-16, 5-24**—Rendering Legal Services For a Client or Customer or an Employee

This opinion concerns a member of the District of Columbia Bar who has been employed by an agency of a major insurance company since 1971. In his capacity as Assistant Manager, Research and Design, he trains insurance agents and advises them on various legal matters involved in their work. He also works with other advisors to clients of the insurance agency, in such areas as the drafting of employee benefit plans. He has never acted as an attorney on behalf of a client of his employer. He is paid a straight salary plus a bonus, based on the volume of work performed by the agency.

The inquiring party recently decided to enter private practice and anticipates that at some point he will be fully engaged in private practice. However, during a transition period he will continue to work for the insurance company on a part-time basis (three days a week), while gradually phasing into his own practice.

The first question posed by the inquirer is whether an agent employed by the insurance company can refer an insurance client to the inquirer in the latter's role as private practitioner.

The District of Columbia Court of Appeals recently amended Canon 2 of the Code of Professional Responsibility and the related Disciplinary Rules regarding advertising and solicitation of business by practitioners in the District of Columbia.

As amended, EC 2-8 no longer cites the principle that the recommendation of an attorney by a third party should be disinterested. It retains the directive, however, that

> "[a] lawyer should not seek to influence another to recommend his or her employment. A lawyer should not compensate another person for recommending him or her, for influencing a prospective client to employ him or her, or to encourage future recommendations."

Addressing the same point, the new Disciplinary Rule, DR 2-103(C), provides that

> "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his or her employment by a client, or as a reward for having made a recommendation resulting in his or her employment by a client. . . ."

While EC 2-8 encourages the inquiring party to refrain from any attempts at influencing the insurance agent's decisions on referrals, the Disciplinary Rule restricts the inquiring

party only from compensating or rewarding the insurance agent for such recommendations. It does not restrict him from, for example, suggesting to the insurance agent that he would welcome referrals. An apparent conflict, therefore, exists between these two provisions. It may well be that this results from an oversight by the Court in drafting these amendments. It is just as likely, however, that the wording of the Ethical Consideration and the Disciplinary Rule was intended by the Court. That is, the Ethical Consideration, being a statement of the goals the legal profession should seek to achieve, is distinguishable from the Disciplinary Rule, which is a precise statement of what is (and is not) a prohibited practice.

Thus, it is clearly permissible for the insurance agency to refer clients to the inquiring party as a result of his own independent deliberation. It is apparently permissible for the agent to recommend clients to the inquirer upon the mere request of the latter. It would be improper, however, for the insurance agent to be compensated or rewarded by the inquiring party for this action. Moreover, if the inquiring party discusses the possibility of referrals with the insurance agent, he should be mindful of EC 2-3 so as to avoid any possible misunderstanding by the insurance agent of what is being requested.

The inquirer asks, second, whether it would be permissible under the Code of Professional Responsibility for him to serve as private legal counsel to a client of the insurance company when, at the same time, he is still a part-time employee of the insurance company. In the fact pattern presented, the inquirer states that the client has been fully informed of the inquirer's relationship to the insurance company and is not troubled by it. Further, the inquiring party states that, as an employee of the insurance agency, he has no financial interest in the specific matter he is being called upon to review. In a more general vein, the inquiring party then asks whether it would be appropriate under any circumstances to assist a potential legal client who has a relationship with the insurance company.

The provisions of the Code of Professional Responsibility provide specific guidance with respect to the professional relationship between an attorney and his or her client. As a result, while the inquiring party is employed by the insurance company, he should enter into a professional relationship with a client of the insurance company only after very serious consideration of whether in his endeavors for the client his professional judgment may be diluted by his loyalty to the company. EC 5-1 emphasizes the importance of the lawyer's independent professional judgment on behalf of a client by noting that

> "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." See *Committee on Professional Ethics and Grievances of the Virgin Islands Bar* v. *Christian*, 191 F. Supp. 87 (D.V.I. 1961).

Additionally, there is the specific issue of representation of multiple clients, which is addressed by EC 5-14. The inquiring party is not presented with multiple clients *per se* since the insurance company is not his client but his employer. The point that EC 5-14 is designed to address, however, is the dilution of the attorney's independent professional judgment, and this is just as likely to arise by virtue of the inquirer's loyalty to his employer as through his loyalty to another client. For this reason, the following directive of EC 5-14 appears applicable:

> "Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant."

See also DR 5-105(A) and (B).

It would appear, therefore, essential for the inquiring party to evaluate carefully whether a conflict exists that could in any way prevent his rendering independent judgment on behalf of a client or dilute his loyalty to a client before entering into a professional relationship with an insurance client of his employer. Such a conflict would exist, for example, if the client was interested in filing a claim against the insurance company. The rendering of independent judgment would be most unlikely in such a situation, and the dilution of loyalty almost inevitable. On the other hand, if the client's interest concerned, for example, the drafting of a will, it would be difficult to imagine a conflict of interests arising.

There is another area in which it would appear appropriate to rely on the Code's directives regarding representation of multiple clients, and that concerns the notice given to the clients. EC 5-16 notes that the attorney must "carefully explain to each client the implications of the common representation and should accept or continue employment only if the clients consent." As explained earlier, while only one client is involved here, the same potential for conflicting loyalties exists. Thus, if the inquirer were to determine that the potential client and the insurance company have differing interests and nevertheless believed he was justified in representing both, it would be appropriate, relying on EC 5-16, to give each of them an opportunity to consider the implications of his planned representation. In the fact pattern presented by the inquirer, an explanation was provided only to the client. The same opportunity should be provided to the insurance company. Should either object, the attorney, again drawing an analogy from the Code provisions on representation of multiple clients, should "defer...and withdraw from representation of that client." EC 5-19.

Finally, the provisions of EC 5-24 also address the importance of an attorney's maintaining independent professional judgment when employed by a business corporation, and, therefore, its directives relate to the specific facts under consideration. EC 5-24 provides, in part, that

> "[a]lthough a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman."

The inquirer's part-time employment with the insurance company suggests the possibility of this type of problem, and the inquirer must be alert to it.

The Committee is not able to provide more specific guidance to the inquiring party on this question since the final decision can only be made by him or, to some extent, by the client or the insurance company. However, the inquiring party is advised of the extreme caution he should exercise in matters where his independent professional judgment and loyalty are at stake. Finally, the general directive of EC 9-6, which directs the lawyer to strive to avoid even "the appearance of impropriety," should not be lost sight of when considering the representation of a client who has potentially diverse interests from the current employer.

Inquiry No. 78-6-13
September 26, 1978

Opinion No. 52

EC 3-3, EC 3-5, EC 3-8, EC 5-22, EC 5-23; DR 3-101(A), DR 3-103; EC 2-8; DR 2-103— Lay Offering of Lawyers' Services to Clients or Customers—Referral

We have received an inquiry from a nonlawyer concerning the conduct of his business activities as a political campaign consultant for candidates for federal office. These activities include rendering opinions concerning the provisions of the Federal Election Campaign Act. The campaign consultant has asked us whether it would be improper for him to include in his professional fee to his customers the charges of a lawyer in private practice (who also happens to be the consultant's lawyer) and to make available to his customers the services of that lawyer. Alternatively, the consultant has asked whether it would be proper for him to advertise that the lawyer's services are available and suggest that his customers retain that lawyer. The consultant states that he has decided to seek a lawyer to advise his customers "in order to stay clear of the unauthorized practice of law." It is our conclusion that the consultant may engage in the latter activity but not the former.[1]

DR 3-101(A) states that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." The Code does not set forth any precise definition of what constitutes the unauthorized practice of law.[2] EC 3-5 states:

> "It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of the lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers...may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required."

We interpret the foregoing ethical consideration to mean that a non-lawyer campaign consultant is generally free to impart his knowledge of federal campaign laws to his customers without engaging in the unauthorized practice of law. When, however, the consultant's customers need advice concerning their individual legal problems under the campaign laws, and those legal problems are sufficiently difficult or complex that the professional judgment of one trained in the law is required, only lawyers may provide such advice. If the layman were to provide advice in these circumstances he would be engaging in the unauthorized practice of law.

In addition to DR 3-101(A)'s admonition that a lawyer shall not aid a non-lawyer "in the unauthorized practice of law," the Code of Professional Responsibility further provides that a lawyer should not ever associate himself with a layman. Thus, EC 3-8 states that, "[s]ince a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman." And DR 3-103(A) provides, "A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law."

In addition to the potential for aiding or encouraging a layman to practice law that an association or partnership of a lawyer with a layman may have, such an association or partnership also carries with it the risk that the lawyer will have divided loyalties and will not exercise his independent judgment. EC 3-3 notes generally that the "Disciplinary Rules protect the public in that they prohibit a lawyer...from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment." Because of this consideration, the American Bar Association has consistently interpreted the ABA Code of Professional Responsibility as precluding any association of a lawyer with a layman. See for example, Formal Opinion 234, holding that a lawyer could not properly associate himself with a non-lawyer in a tax return service even though the name and identity of of the lawyer did not appear in the advertising for the service, and Informal Opinion 1212, holding that a lawyer could not agree with a broker-appraiser to provide settlement services to the broker-appraiser's clients. In the latter opinion, the ABA's Committee on Ethics and Professional Responsibility stated that "[t]he relationship between the lawyer and the property owner should be direct and personal, and any compensation to be paid by the property owner to the lawyer should be agreed upon with, and paid to, the lawyer himself."

Our conclusion is further supported by the ethical considerations of Canon 5 dealing with the obligation of a lawyer to exercise independent professional judgment solely on behalf of his client. Thus, EC 5-22 provides:

> "Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client."

And EC 5-23 provides:

> "A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong presures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom."

DR 5-107(B) provides:

> "A lawyer shall not permit a person who recommends...him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

While it is our opinion that the campaign consultant cannot associate a lawyer with his business and make the lawyer's legal advice, together with his own, available to his clients, we conclude that he can properly tell his clients that his own lawyer is available to provide legal advice and to suggest that his clients independently retain him.

It has always been proper for lay persons independently to recommend lawyers to other laypersons. Thus, EC 2-8, as recently amended by the D.C. Court of Appeals, Order, July 12, 1978, notes: "Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers...may be helpful." EC 2-8 does contain a caveat, however, that "A lawyer should not compensate another person for recommending him or her, for influencing a prospective client to employ him or her, or to encourage future recommendations." DR 2-103(C), as recently amended, also states clearly:

> "A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his or her employment by a client, or as a reward for having made a recommendation resulting in his or her employment by a client, except that he or she may pay for public communications permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored or approved by a bar association."

DR 2-103(B) contains one other caveat:

> "A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of his or her services or those of his or her partner, or associate, or any other lawyer affiliated with him or her or his or her firm, as a private practitioner, if:
>
> "(1) The promotional activity involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C); or
>
> (2) The promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over-persuasion, overreaching, or vexatious or harassing conduct."

These recently amended rules are a liberalization of the rules set forth in old DR 2-103 (D) and DR 2-103(C).[3]

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[1]The inquiring campaign consultant also requests an opinion as to the effect of a neighboring state bar association's code of professional responsibility on the consultant's contemplated activities. This Committee has no authority to opine on the ethical rules of any jurisdiction other than the District of Columbia.

[2]Individual state and local statutes, court rules and cases need to be consulted for further illumination of what is considered "unauthorized practice of law" in each jurisdiction. In the District of Columbia, the relevant rule is Rule 46.II.b of the Rules of the District of Columbia Court of Appeals.

[3]Old DR 2-103(D) stated that "A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his

Since there is no indication in the inquiry of a flow of consideration from the lawyer to the consultant for recommending his employment or of any deception or duress in connection with the recommendation, there is no violation of DR 2-103(B) or (C).

Inquiry No. 75-10-5
November 21, 1978

Opinion No. 53

DR 2-101; EC 2-8; EC 2-10; EC 2-11—Newspaper Advertisement For Divorces; Name of Lawyer Not Disclosed; "Fees from $150."

An inquiry has been submitted to the committee as to "whether a lawyer can advertise without disclosing his name." The inquiry encloses a copy of a newspaper advertisement that reads in form as follows:

DIVORCES
Attorneys Fees
from $150
Other Legal Services at
Comparable Rates
In Maryland or District
987-6543 210-9876

The inquiry was addressed to the committee prior to the 1978 revision by the District of Columbia Court of Appeals of the Canon 2 portion of the Code of Professional Responsibility.[1] However, the inquiry will be answered under the revised Code because the principal function of committee opinions is to furnish guidance for future conduct and not to pass judgment on past conduct.[2]

DR 2-101(A) prohibits statements in lawyer advertising that are "false, fraudulent, misleading, or deceptive." DR 2-101(B) defines such statement to include any statement that "[o]mits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading." Assuming that the advertisement in question has been placed by an attorney who does in fact represent clients in divorce actions in Maryland and the District of Columbia, and that the telephone numbers (changed for purposes of this opinion) are the telephone numbers of that attorney, we find nothing inherently misleading in the failure of the advertisement to provide the attorney's name.

Three ethical considerations under Canon 2 make reference to the name of a lawyer as being significant in the process by which a client selects an attorney. We have considered them and believe that none can properly be interpreted as imposing an absolute requirement that a lawyer's name be included in all lawyer advertising.

EC 2-8 states that information that "may be helpful" in "some situations" would include the lawyer's "name" as well as other specified information. It thereby clearly implies that not all such information is required in all situations.

EC 2-10 states that the Disciplinary Rules "recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding falsity, deception, and misrepresentation." The language about "forms of advertising that furnish identification of a lawyer" is carried over in exact form from EC 2-10 as it was recommended by the American Bar Association and in effect in the District of Columbia prior to the 1978 revision. That language cannot properly be interpreted as requiring in all instances identification of lawyers who place advertisements. The Disciplinary Rules themselves, which EC 2-10 purports to interpret, do not impose identification of the advertising lawyer as an absolute requirement—though it would have been easy to say so if that is what was intended. Under the same language of EC 2-10, before 1978, the A.B.A. routinely approved lawyer advertisements for full-time legal positions (one of the long-recognized exceptions to the general lawyer-advertising ban) where the name of the advertising lawyer was not disclosed. See A.B.A. Informal Opinions 711, 1225 and 1242.

EC 2-11 says that the "name under which a lawyer conducts his or her practice may be a factor in the selection process." It does not say that the name is a necessary factor and must be disclosed at all stages in the selection process. EC 2-11 deals primarily with names of law firms. Its principal purpose is to avoid the use of law firm names that might mislead the public by inclusion of names of individual attorneys who do not actually practice with the firm or who have status other than is indicated by the firm name.

While in view of what we have said above we believe it unwise and contrary to the interests of consumers of legal services for an attorney to fail to identify himself in an advertisement for legal services, we cannot say that it would be unethical under the Code of Professional Responsibility. However, there are other aspects of the ad that do violate the Code. Those are the aspects relating to the statements as to legal fees.[3]

The ad says: "Atttorneys Fees from $150." New DR 2-101(B)(5) characterizes as necessarily "misleading" any statement that "[r]elates to legal fees" other than certain particularly listed and described statements. None of the listed statements is broad enough to include the statement "Attorneys Fees from $150."

DR 2-101(B)(5)(c) does permit a "statement of the range of fees for specifically described legal services." However, the term "range of fees" connotes an upper limit as well as a lower one. No upper limit is stated in the advertisement in question. Moreover, even in connection with a "range," the rule requires "a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive." There is nothing in this ad that could be construed to be such a statement.

The ad also states: "Other Legal Services at Comparable Rates." This likewise is a statement that relates to legal fees other than one of the statements specifically listed and described in DR 2-101(B)(5)(c). Hence, it is prohibited.

The committee passes no judgment on whether the statements in the advertisement are actually misleading in fact. Each of them must be considered "misleading" under DR 2-101(B), and hence proscribed, simply by reason of the fact that they relate to legal fees and do not fall within the particularly listed and described statements as to fees that are indicated as permissible.

Inquiry No. 77-8-14
October 31, 1978

Opinion No. 54

DR 5-105(A); DR 105(C); EC 5-15, 5-16, 5-17—Propriety of Multiple Representation

We have been asked to advise whether a law firm that represents a client admitted as an intervenor in a licensing case before a federal regulatory agency may undertake the representation of another client, an intervenor in the same case.

For some time, a partner in the firm has represented a citizens' lobby opposed to a proposed energy facility and admitted as an intervenor in the licensing case before the federal agency. The citizens' lobby is opposed to the proposed development generically and specifically. Recently, a new partner in the firm was asked by his former employer, the state's attorney general and

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partners or associates" with the exception of certain legal service organizations. DR 2-103 (C) also flatly provided that "A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate" with the exception of lawyer referral organizations.

[1]See DR 2-101 through DR 2-105 and EC 2-1 through EC 2-15, revised July 12, 1978. 106 Wash. L. Rptr. 1265 (July 14, 1978).

[2]The pre-revision prohibited newspaper advertisements by lawyers generally. It would clearly have proscribed the advertisement here in question. The instant inquiry was submitted in the wake of the Supreme Court decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Its apparent purpose was to obtain an opinion from the committee on whether the general Code prohibition on lawyer advertising, when applied to an advertisement that did not disclose the name of the advertiser, survived the constitutional limitations announced in *Bates*. Even if the general prohibition were still in effect, that would be a question of law other than one of interpretation of the Code itself and accordingly one as to which the committee would not ordinarily address an opinion. See Rule C-5, Legal Ethics Committee.

[3]Some members of the Committee are concerned that in its application in this case the provision of the amended Code that deals with allowable lawyer publications relating to fees may violate the First Amendment.

an intervenor in the same case, to resume representation of the state along with co-counsel in the state attorney general's office. The new partner had filed the initial pleadings on behalf of the state. While the state is not opposed to the kind of proposed development generically, it is opposed specifically to this particular development.

We are advised that both clients, after "full disclosure," understand and have agreed that in this proceeding their positions are consistent with each other.

DR 5-105(A) states:

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

DR 5-105(C) provides that multiple representation may be undertaken where it is "obvious" that the lawyer can "adequately represent" each client's interest *and* each client "consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Sufficient concerns exist in the inquirer's proposed dual representation to question the practice on the basis of DR 5-105(A). Concerns such as the flat opposition of the citizens' lobby to the proposed development both generically and specifically, as compared with the state's more limited opposition in this particular development, suggest a potential for conflict between both clients. Thus, it is likely that the firm's exercise of independent professional judgment on behalf of one client or the other may be affected by the undertaking of the dual representation. The question then is whether the proposed representation falls within the scope of DR 5-105(C).

There are admitted difficulties in reconciling the language of DR 5-105(A) and (C). In our recent Opinion No. 49 we said, in part:

> If the exercise of independent professional judgment in behalf of a client is equated with adequate representation of the client, it is hard to understand how it can ever be "obvious" that a lawyer can "adequately represent the interest of each client" in a case in which "the exercise of his independent professional judgment in behalf of" one or the other "is likely to be adversely affected." If DR 5-105 (C) is read literally, it requires *both* that it be obvious that the lawyer can adequately represent each client and that the lawyer have the informed consent of both clients before the lawyer can undertake a dual representation that otherwise would be barred by DR 5-105 (A). If adequate representation means representation in which the exercise of the lawyer's independent judgment is not likely to be impaired, the first requirement of DR 5-105(C) logically can never be satisfied, and the question whether informed consent has been given is never reached....Nevertheless, the Committee does not consider itself justified in ignoring the apparent first requirement of DR 5-105(C) or in reading the "and" of DR 5-105 (C) to mean "or" so that *either* an obvious ability to represent each client adequately *or* informed consent would suffice to remove the bar of DR 5-105(A).

The opinion continues:

> In the consent provision of DR 5-105(C) can be found the makings of a formula for reconciling DR 5-105(A) and DR 5-105(C). The requirement of DR 5-105(C) is that each client consent "after full disclosure of the effect of" the dual representation "on the exercise of" the lawyer's "independent professional judgment on behalf of each." It is assumed, in other words, that consent may be given even though, to the knowledge of the client, the exercise of the lawyer's independent professional judgment may be impaired; it is assumed that it is not obvious that the exercise of his judgment will not be impaired. Unless DR 5-105(C) was deliberately drafted to be a nullity, this must mean that "adequately represent" in the first part of DR 5-105(C) means something other than to represent with unimpaired professional judgment. What it has to mean is that the representation will be adequate to the purposes of the clients in the light of the understanding of the nature of the representation that is necessarily implied by each client's consent to the dual representation after the disclosure to each client of how the duality of the representation will affect the lawyer's performance.

We then suggested that where the attorney is viewed as an adviser, negotiator, or scrivener, informed consent usually suffices, but that a more difficult circumstance occurs when the clients view the attorney as advocate because the advocacy role carries the implication of the championing of one position over another.

In the inquiry before us, it is clear that the clients view the law firm's representation as including an advocacy role. Each client wants to win something, one more than the other, in the licensing proceeding. Here it appears what each party needs is an advocate, not a negotiator or scrivener. Involved is a multi-party administrative proceeding that may entail many of the indicia of a trial, *i.e.*, presentation of documentary evidence, cross-examination of expert witnesses, etc. We are told that the citizens' lobby, which is represented by one partner in the law firm, is opposed to the proposed project (let us assume that it is a nuclear-energy reactor), both generically and specifically; in other words, this client will do everything possible to stop the construction of nuclear-power plants anywhere. On the other hand, the new partner in the firm has been asked to act as co-counsel with the state attorney general, also an intervenor in the licensing case, and represent a client opposed specifically to this particular license, but not to the construction of nuclear-power plants in general. In fact, it may be that the state's policy may favor promotion of nuclear energy to meet its energy needs. Considering that they are based on different philosophical premises, we can foresee that in the heat of battle the positions of the litigating parties may be in serious conflict.

However, as we stated in Opinion No. 49, what "adequately represent" in the first part of DR 5-105(C) must mean is that the representation will be *adequate to the purposes of the clients in the light of the understanding of the nature of the representation that is necessarily implied by each client's consent to the dual representation* after the disclosure to each client of how the duality of the representation will affect the lawyer's performance. Here, we understand that full disclosure has been made to both clients, who understand and have agree that in this proceeding their respective positions on licensing the project are consistent with each other. While, in view of what we have said above, we believe it may not be wise for the clients to consent to the dual representation by the firm, we cannot say it would be unethical under the canons. We would simply note that in informing their clients and obtaining their consent the lawyers should stress the now unanticipated difficulties that may arise along the way and may prompt one or the other client to decide to change counsel, and the emotional wear-and-tear and additional legal expense such a decision may involve.

Inquiry No. 77-12-26
November 21, 1978

Opinion No. 55

DR 7-109(C); DR 3-101(A); DR 3-102— Contingent Fee to Organization Obtaining and Paying Fees of Expert Witnesses

An attorney who represents indigent claimants in personal injury actions asks whether it is ethically permissible to arrange for medical expert testimony in their behalf through an organization that charges a contingent fee for its services. We believe that, in the circumstances presented by the inquiry, there is no violation of the Code of Professional Responsibility. Our conclusion is not premised on the claimants being indigent.

The organization helps attorneys and their clients find appropriate medical expert witnesses. It provides its services on a retainer and cost basis or, alternatively in cases which it deems to be of sufficient merit, on a twenty percent contingent fee basis. In cases which the organization agrees to accept on a contingent basis, it pays the medical expert a reasonable fee plus expenses regardless of the outcome of the case. Only the organization itself is paid on a contingency.

An agreement is executed by the injured party authorizing his or her attorney to pay the organization from the proceeds of any judgment or settlement. The contingent fee of the organization providing the medical expert witness is separate and apart from the contingent fee charged by the attorney for legal services.

DR 7-109(C) provides:

"A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case."

We have previously dealt with this rule in Opinion No. 20, in which we held it to bar the employment of a firm of economic consultants on a contingent fee basis by plaintiffs in an antitrust action. The rationale for the rule is that providing a witness with a stake in the outcome of the case is necessarily offering a temptation to false or slanted testimony. See *Person* v. *Association of the Bar of the City of New York*, 554 F.2d 534, 538 (2d Cir.) *cert. denied*, 434 U.S. 924 (1977); and *In re O'Keefe*, 49 Mont. 369, 142 Pac. 638 (1914), the latter case being cited in a note to DR 7-109(C) in the Code of Professional Responsibility. That rationale is not applicable where the witness is paid regardless of the outcome of the case, even though the organization finding and retaining the witness for the client elects to assume the risk entailed in making its own fee contingent.

We assume, for purposes of this opinion, that the witness whom the organization retains have no ownership interest in the organization that retains them. With that assumption, we find no violation of DR 7-109(C) in the arrangement posed by the inquiry. We add, though it should perhaps be self-evident, that the admonitions of EC-21 through EC-24 must be observed. Thus, the attorney will continue to owe his entire allegiance to his client notwithstanding any conflicting desires of the organization that acquires, through a contingent fee arrangement, an interest in his client's cause of action.

It is possible that objections could be raised to the arrangement under two other disciplinary rules. DR 3-101(A) prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law. DR 3-102 prohibits a division of legal fees with a non-lawyer. *Cf.* ABA Informal Opinion 1375 (Aug. 10, 1976), discussing the applicability of DR 7-109(C) and these two other rules to contingent-fee consulting services. We find neither DR 3-101(A) nor DR 3-102 to be violated by the arrangement posed in this case.

The services rendered by the lay organization in finding appropriate medical witnesses, paying them for their consultation and testimony and assuming a portion of the injured party's financial risk of prosecuting the lawsuit, do not constitute the practice of law. The fact that lawyers themselves frequently perform the function of finding medical witnesses for their clients' cases does not make this necessarily a legal service. Many of the various functions performed by lawyers in preparing caes for trial can be performed by others also. As long as the services are not distinctively legal and remain subject to the control of the lawyer who has responsibility for the case, those performing them are not engaged in the unauthorized practice of law. We assume that the lawyer posing this inquiry is free to accept or reject medical witnesses proffered by the lay organization, depending on his evaluation of the contribution they can make to his client's cause.

We caution that, though the lay organization is not properly considered to be practicing law within the meaning of DR 3-101(A), its services may displace lawyer work. To the extent that this happens, through its analysis of records, finding and interviewing witnesses, preparing factual statements for experts, and similar services, the reasonableness of the lawyer's contingent fee percentage may be affected.

Insofar as DR 3-102 is concerned, the fees charged by the lay organization for its services and its assumption of risk are not legal fees. Moreover, they are paid by the client and not by the lawyer. Consequently, there is no division of legal fees by the lawyer with a layman.

Inquiry No. 78-5-11
October 31, 1978

Opinion No. 56

DR 7-109(C)—Agreement to Reimburse an Expert Witness from Proceeds of Judgment or Settlement

We have been asked to give our opinion on the permissibility under the Code of Professional Responsibility of an assignment by a client to a medical or other expert witness, with a lawyer's approval, of a portion of any recovery by way of settlement or judgment in a personal injury suit. The question comes to us as an indirect result of an inquiry put by the Chairman of the Clients' Security Fund of the Bar to the General Counsel of the Bar as to whether the Fund was free to honor or was required to honor any such assignment when making good for a defaulting laywer. That issue is not before us. The issue of the permissiblity under the Code of the assignment itself was perceived by the General Counsel to be inherent in the matter and was referred to us.

The only provision of the Code that might be argued to be applicable is DR 7-109(C) and the related Ethical Consideration, EC 7-28. DR 7-109(C) provides:

"A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon...the outcome of the case."

We have ruled in Opinion No. 20 that this rule means what it says and precludes a contingent fee for an expert witness. In Opinion No. 55, on the other hand, we said that it did not preclude the payment of a contingent fee to an organization that supplies expert witnesses if those witnesses are paid by the contracting organization regardless of the outcome of the litigation.

In this case the client's assignment of a portion of the recovery is not in lieu of his obligation to pay the expert witness in any event but is in support of that obligation. A form that has been supplied to us states that the client understands "that this in no way relieves me of my personal primary responsibility to pay my physician for such services when statement is rendered."[1] In the circumstances we do not believe that the arrangement is fairly to be described as a contingent arrangement within the proscription of DR 7-109(C).

We note that a question similar to the one we are now considering was put to the ABA Committee on Ethics and Professional Responsibility, which, without even making specific reference to DR 7-109(C), stated its opinion that no provision of the Code

"would preclude a lawyer from permitting his client to execute an authorization form such as the one submitted to you by the physician provided that the nature and contents of the same are fully explained to the client by you and that there is no reason to doubt his competency to comprehend the explanation." Informal Opinion No. 1295, Aug. 18, 1974.

The ABA Committee went ahead to caution, as we also do, that the lawyer should keep always in mind that he has an obligation to preserve the client's right to object to bills that seem too high to the client.

Inquiry No. 78-4-9
October 31, 1978

Opinion No. 57

Canons 2, 5, 7 and 9; EC 5-1, EC 7-17 and EC 9-2—Contributions by Lawyers and Law Firms Practicing Before a Regulatory Agency to a Public Interest Law Firm Also Practicing Before That Agency

We have been asked whether it is proper for a lawyer or a law firm representing clients before a regulatory agency to make financial contributions to a public interest law firm which engages in practice before the same agency, and which may represent clients with positions adverse to those of the contributing lawyer or law firm. We conclude that such contributions, unless specifically destined to support litigation in which the contributor's client is an adverse party, are ethically permissible.

The public interest law firm in question, a non-profit, tax exempt entity (to which, we presume, contributions would be tax deductible), apparently engages in practice only before a single federal regulatory agency. (We will not identify that agency here both because of the Committee's Rule E-6, which contemplates that the identities of the immediately interested parties to inquiries to which we respond will not be identified, and

[1]The assignment part of the form instrument says that "I...authorize and direct [my attorney or insurance company] to pay from the proceeds of any recovery in my case to my physician...for his professional services (including fees for preparation and testimony)...."

because our analysis does not rest on any unique characteristic of the agency in question.) The agency regulates a nationwide industry, licensing members of the industry and conducting not only general rulemaking proceedings but also adjudicatory proceedings, which may be concerned with the granting or revocation of individual licenses.

The stated purpose of the public interest law firm is to encourage the provision of services by members of the industry that are "more responsive to the diverse needs and interests" of "the poor, and underprivileged, and the victims of discrimination and/or alienation." Its staff attorneys represent clients before the agency in proceedings in which they believe these purposes can be furthered. Although the firm evidently does not confine its representation to indigents or others unable to pay legal fees, we assume from its non-profit, cause-oriented nature that to a significant degree it furnishes representation without fee, or at fees substantially below ordinary commercial rates.

The firm proposes to solicit cash donations from lawyers and law firms, including ones who practice before the agency. At least some of the latter are lawyers or firms whose clients currently are or are likely to be parties adverse to clients represented by the public interest law firm in specific proceedings before the agency. The specific solicitation giving rise to the inquiry is stated to be for the purpose of funding a law library for the use of the lawyers employed by the firm; though it is also stated that the library "may" be available to other members of the Bar as well.

For purposes of the present opinion, the question whether the funds solicited are to be used for a law library accessible only to lawyers in the firm, or to other lawyers as well, seems irrelevant; the principal purpose, we take it, would be to assist the firm's operations generally. It seems an equally irrelevant consideration whether the funds would be used for a law library, on the one hand, or on the other for defraying some other general expense of the public interest firm, such as rent, or office equipment, or even lawyers' salaries. As we view the matter, the particular use to be made of the donated funds would become significant only if they were specifically designated for employment in a case in which the donor attorney or law firm was representing an adverse party. This, we understand, is not the case in the particular instance prompting the inquiry.

We find no ethical provision, nor any published opinion of an ethics committee, dealing with the precise fact situation before us—or, indeed, anything close to it. We must look, therefore, to relatively general principles and analogies at some remove. There appear to be three general principles of potential applicability, expressed in Canons 5, 7, and 9 and in each instance somewhat refined by an attendant ethical consideration.

The first such general principle is found in Canon 5, stating that, "A lawyer should exercise independent professional judgment on behalf of a client." EC 5-1 sets out somewhat more explicitly one aspect of this obligation:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interest of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

This Ethical Consideration asserts that in certain respects at least the lawyer owes an undiluted loyalty to his or her client (*Compare* former Canon 6, referring to "undivided fidelity.")

The second general principle is Canon 9's broadly inclusive commandment that "A lawyer should avoid even the appearance of professional impropriety." EC 9-2 separates some strands in this ethical skein which might have bearing here:

> Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical....While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exists, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

We understand this Ethical Consideration to state that even in the absence of a specific ethical prohibition a lawyer should eschew conduct that tends to diminish public confidence in the legal profession (*see also* EC 9-6); but also that the possibility of an uninformed misunderstanding should not deter a lawyer from discharging his professional obligations.

Finally, while Canon 7 declares the general principle that, "A lawyer should represent a client zealously within the bounds of the law," one of its attendant ethical considerations, EC 7-17, spells out a limiting principle that has some possible application here:

> The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

We understand the principle here stated, in essence, to be that a lawyer's obligation of loyalty to his or her client does not extend to governance of the lawyer's personal views on matters of public interest or to public expression of those views.

It might be argued that a lawyer or firm making a financial contribution to a public interest law firm that represented clients whose interest were adverse to those of clients of the contributor was manifesting a diluted loyalty to those clients, within the contemplation of EC 5-1. It might also be argued that such a contribution would carry an appearance of professional impropriety, so as to erode public confidence in the law and lawyers, within the meaning of EC 9-2—perhaps because of the very dilution of loyalty ostensibly manifested by the contribution. In our view, however, the degree to which such arguments had substance would depend on the extent to which the contributions were made for the purpose, or with the expected effect, of supporting the other side of a case in which the contributing lawyer or firm was actively representing an adverse party. Where solicited funds were clearly and specifically to be used to defray the costs of a particular case, or to pay the salary of a lawyer working on such a case, a lawyer donating such funds while representing an opposing party in the case would indeed give cause to question not only the integrity of his or her representation but also the disinterestedness of the contribution itself. However, even though in a sense any contribution to an entity furnishes support in some degree to every activity of the entity, we do not think the foregoing reasoning can properly be applied to contributions merely going to the general support of the public interest law firm, rather than to subsidization of a particular case.

Where a financial contribution furnishes only such general support, in our view it cannot properly be construed as manifesting a dilution of that loyalty to a client that is ethically required, even though the recipient firm may be representing parties adverse to the donor's client. The reason for this is that, as EC 7-17 indicates, the loyalty that a lawyer owes to his or her client does not extend to conforming the lawyer's personal views on matters of public importance to the views or even the interests of the client. A donation to a public interest law firm as to any other non-profit entity serving public purposes, may of course be one means of expressing personal views; and such expression involves the exercise of First Amendment rights. *See, e.g., Bates* v. *Little Rock,* 361 U.S. 516 (1960); *First Nat'l Bank of Boston* v. *Bellotti,* 55 L.Ed.2d 707 (1978).

Moreover, where the recipient entity is a public interest firm, donations by lawyers may well be a means of meeting the general ethical imperative expressed by Canon 2, which states that "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." The American Bar

Association's House of Delegates has interpreted this Canon as involving an obligation on each individual practicing lawyer to provide "public interest legal services, " which it has defined to include the sort of activities in which we take the public interest firm here in question to be involved. The pertinent resolution, approved in August 1975, reads in part as follows:

RESOLVED, That it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services:

FURTHER RESOLVED, That public interest legal service is legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:

1. Poverty Law: Legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel.

2. Civil Rights Law: Legal representation involving a right of an individual which society has a special interest in protecting.

3. Public Rights Law: Legal representation involving an important right belonging to a significant segment of the public.

The ABA's statement followed and somewhat expanded a similar Statement Of The District of Columbia Bar (Unified) As To The Public Service Obligation Of Its Members, adopted by our Board of Governors on March 12, 1974.

The foregoing should not, of course, be understood as implying that any lawyer or firm has an ethical obligation to make cash or other contributions to this particular public interest law firm, or to any other such firm. It is our view merely that, within the limitations stated, if a lawyer or law firm is inclined to make such a contribution, the fact that the recipient entity may be representing parties adverse to clients of the contributor does not in itself amount to an ethical barrier to such contribution. Nor, necessarily, would the fact that the contributor's client might object to the contribution being made constitute a barrier of an ethical nature.

Inquiry No. 78-7-14
November 21, 1978

Opinion No. 58

DR 4-101—Preservation of Confidences and Secrets of a Client by Attorney Accused of Misconduct

We have been asked to advise whether an attorney who is the subject of a disciplinary investigation by a bureau of a federal regulatory agency may defend himself by revealing to the agency bills he submitted to clients who are not otherwise involved in the investigation.

Facts

The attorney's practice is almost exclusively devoted to proceedings before the agency and to advising clients with respect to matters within the agency's regulatory jurisdiction. The bureau has the authority to investigate matters within the jurisdiction of the agency. The focus of the bureau's disciplinary investigation is the bills for legal fees and reimbursable expenses that the attorney submitted to a client regulated by the agency. Although the bureau's contentions are not clear, the bureau has revealed that it believes it can show that a number of expenses for which the attorney sought reimbursement were inaccurately stated on the bills. Thus, the bills state meal expense items as "11/3—Lunch, Jones [Restaurant], D. Smith [Agency]—$19," and the bureau contends that the reference to Mr. D. Smith of the Agency is inaccurate.

Part of the attorney's defense will be that such inaccurate items were isolated instances and not part of a course of conduct. Specifically, he would want to demonstrate that such inaccuracies appeared on only bills to this particular client and only on three such bills.

Most of the attorney's clients are in an industry regulated by the agency, and the bureau has the power to institute an investigation or initiate enforcement proceedings with respect to almost any matter within the jurisdiction of the agency. Thus, any disclosure about a client that arouses the interest of the agency could give rise to an investigation or proceeding. Although in some instances the fact that the attorney was retained by a particular client is a matter of public record or is known to the bureau, in other instances the fact that the attorney provided legal services to a particular client is confidential. Moreover, although the attorney believes that neither disclosure of the bills nor an investigation inspired thereby would uncover violations of law or regulation by his clients, some items on the bills might cause the bureau to investigate a client's affairs, causing, at the very least, considerable expense and inconvenience. The attorney believes that some clients would not consent to disclosure.

The inquirer, who is representing the attorney under investigation, asks whether the attorney may reveal bills submitted to clients (a) to the bureau in the course of its investigation and (b) to the agency in the course of a formal disciplinary proceeding. Alternatively, the inquirer asks whether the attorney may testify that he has examined all bills submitted by him to other clients and has found no expense items that include references to agency personnel.[1]

Our conclusion, in brief, is that the attorney may not disclose such bills to either the bureau or the agency, but he may testify that he has examined the bills submitted to other clients and has found no expenses which include references to agency personnel.[2]

Discussion

An attorney is obligated to preserve both the "confidences" of a client—information covered by the attorney-client privilege—and the "secrets" of a client— "information gained in the professional relationship...the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A) and (B). The ethical obligation to guard the confidences and secrets of a client, unlike the attorney-client privilege, "exists without regard to the nature or source of information or the fact that others share the knowledge." EC 4-4; Opinion No. 14, Committee on Legal Ethics, District of Columbia Bar.

In the context described by the inquirer, the attorney's bills contain both confidences and secrets of his clients.[3] The bills would reveal the fact of the attorney's representation which, in some instances, is a secret. The bills also would indicate the tasks performed by the attorney and the scope of his employment, which might reveal both confidences and secrets.

An attorney is prohibited under Canon 4 from (1) revealing a confidence or secret of his client, (2) using such a confidence or secret to the client's disadvantage, or (3) using such confidence or secret for the attorney's advantage. DR 4-101(B)(1)-(3). In this instance, DR 4-101(B)(1) and (2) are directly applicable since the bills would be revealed to the agency and such revelation likely would disadvantage at least some clients. DR 4-101(C)(3), which prohibits the use of confidences or secrets for the attorney's advantage, might also be considered applicable as well, although the annotation for that subsection refers to ABA Canon 11, which suggests that (C)(3) is generally used to define an attorney's ethical obligations in dealing with property of his client.[4]

The only applicable exception to the prohibition of disclosure is found in DR 4-101 (C)(4) which provides:

(C) A lawyer may reveal:

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(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

This provision, and the analogous provi-

[1]The inquirer does not ask whether the attorney may reveal other bills submitted to the client whose bills are the focus of the bureau's investigation, as described above.

[2]Neither the inquiry nor this opinion distinguishes between present and former clients with regard to the protections afforded by Canon 4.

[3]It is clear that information which appears on bills may be considered confidential. *See, e.g.*, ABA Opinion 154 (1936); ABA Informal Opinion No. 912 (1966). The question whether the material in the bills is actually privileged is one of law rather than ethics on which the Committee will not express an opinion. Legal Ethics Committee Rule C-5.

[4]DR 4-101(C)(1) permits a lawyer to reveal confidences or secrets of clients if consent has been obtained after full disclosure. However, under the facts presented by the inquirer, such consents have apparently not been obtained.

sion in former Canon 37, have been applied to permit disclosure of the confidences of a client by an attorney where disclosure is necessary to protect the attorney's interests in a dispute arising out of the relationship between the attorney and the client whose confidences are disclosed. It has not been applied to a situation such as that presented here, where the relationship between the attorney and the client whose confidences are to be disclosed is unrelated to the disputed matter. It is the Committee's opinion that DR 4-101(C)(4) does not permit disclosure of the confidences or secrets of a client when the investigation or dispute in which the attorney is implicated and in which disclosure is intended did not arise out of the representation of that client.

The notes to DR 4-101(C))(4) cite former Canon 37 and ABA Opinions 19, 202 and 250. The analogous portion of former Canon 37 clearly limits the disclosure exception to situations in which the attorney is defending against an accusation by his client:

> If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation.

ABA Opinion 19 (1930) involved an investigation into the professional conduct of an attorney, an investigation in which a client had voluntarily given testimony and correspondence to a grand jury and to the court. In that circumstance, the attorney was permitted to defend himself by revealing confidences of the client which were material to the proceeding.[5] Similarly, Opinion 202 (1940) makes clear that an attorney may disclose confidences if he is accused by his client. It notes that the attorney may not make such a disclosure in an effort to protect himself from potential accusation by others.

Finally, ABA Opinion 250 (1943), quoted at length in the note to DR 4-101(C)(4), states that an attorney may, in the course of litigation against a client, use confidential information where it is "clearly necessary to obtaining or defending his rights." The Opinion concludes that a lawyer may reveal confidences "where disclosure is necessary to protect the attorney's interests arising out of the relation of an attorney and client in which disclosure is made."

The broadest interpretation of DR 4-101 (C)(4) can be found in *Meyerhofer* v. *Empire Fire and Marine Insurance Co.*, 497 F.2d 1190 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974), a case which has met with considerable criticism.[6] In that case, an attorney named as a codefendant in a civil suit along with his former law firm and its client, was held not to have violated DR 4-101 when he disclosed confidences of the client in order to persuade the plaintiffs to dismiss the suit against him. Even in that case, however, the disclosure related to the attorney-client relationship from which the litigation arose.[7]

It is clear that in every instance in which disclosure has been permitted, disclosure was found to be necessary to protect the attorney's interests *arising out of* a particular attorney-client relationship. Although there need not be actual litigation between attorney and client, there must be, at the very least, some dispute arising out of the attorney-client relationship, placing attorney and client in an adversary position.[8] It is not sufficient that the confidences of a client who has no relation whatever to the accusations against the attorney would be helpful to the attorney's defense against the accusation. Thus, in this case, in the absence of informed consent by a client, the lawyer may not disclose the confidences or secrets of a client whose activities and relationship with the attorney are completely unrelated to the disciplinary investigation. Although we are sympathetic to the fact that the attorney here is substantially disabled from raising a critical defense—that the inaccuracies in question are isolated instances and not part of a pattern of conduct—we do not believe that the Code permits the attorney to disclose the confidences or secrets of his clients in these circumstances.

In this regard, there is no difference between disclosure of the bills to the bureau in the course of an investigation and disclosure of the bills to the agency in the course of formal proceedings. A similar restriction would not apply, however, to a general statement by the attorney that none of the bills submitted to his other clients contain such inaccuracies. Inasmuch as this statement would not disclose the names of his clients or the services he has performed, the attorney would not violate DR 4-101 in making such a statement. Because the provisions of DR 4-101 are designed to protect a client's interests, and thus are only waivable by the client, such a statement by the attorney cannot undermine the protection that DR 4-101 affords the client.

Opinion No. 59

DR 2-110(A)(2); DR 5-103(A)(1); EC 2-23; EC 5-7—Assertion of Retaining Lien after Discharge of Attorney; Relevance of Duty to Avoid Foreseeable Prejudice to Client's Interests

Issues

The Bar Counsel, in response to an inquiry from a practicing lawyer, has asked us to address three related questions concerning the propriety of the assertion of a "retaining lien" following a client's decision to change counsel:

1) Is it ethically proper for a discharged attorney to retain a client's file in order to protect the attorney's fee, where the former client or his new counsel would merely be inconvenienced by the assertion of the retaining lien?

2) May a discharged attorney assert a retaining lien if the file he proposes to withhold is necessary for new counsel acting (a) as a legal advisor or (b) as an advocate in connection with court actions which are to be commenced or have started?

3) What constitutes "foreseeable prejudice" to the rights of a client for purposes of determining whether it is permissible to assert a retaining lien on the client's file?

These questions raise delicate issues concerning the nature of the legal profession as a service profession and not a mere business. Weighing all of the considerations, we conclude that under the Code of Professional Responsibility, the questions should be answered in the following way:

1) A lawyer may ethically assert a retaining lien by withholding his former client's file in order to secure payment of his earned fees, even if the assertion of the lien causes inconvenience to the client. By definition, the effectiveness of a retaining lien assumes that it will result in inconvenience.

2) An attorney has the right to assert a retaining lien even if the file is "necessary" for new counsel to act either as an advisor or as litigation counsel, except when (a) the client is financially unable to pay the fees; (b) the client gives other security for payment of the fees; or (c) the file is necessary to the defense of a serious criminal charge or to the protection of the client's personal liberty.

3) The lawyer's duty to avoid "foreseeable prejudice" of the rights of the client after the lawyer withdraws from a representation does not bar the assertion of a retaining lien, except in the situations described in the answer to the second question. The lawyer should assume the initiative, however, in seeking to avoid the need for actual invocation of the lien, and should ordinarily renounce the lien unless his legitimate financial interests clearly outweigh the adversely affected interests of his former client.

Facts

The facts provided to us as the context for this inquiry are sparse. We are told only that the client has discharged his former counsel without paying him a substantial fee that is owing as a result of services performed. No

[5] The Opinion indicates that the fact that a client volunteers otherwise protected information makes it unnecessary for the attorney to continue to safeguard the client's confidences:

> [T]he object of sealing the attorney's lips is the protection of the client and where the latter voluntarily aids a prosecution against the attorney for conduct in connection with the matter in which the confidences were given, he would appear to have waived such protection as to those particular confidences.

[6] *See, e.g.*, 40 Mo. L. Rev. 327 (1975), 1975 Duke L. J. 121.

[7] To the extent that dictum in the Meyerhofer opinion can be read as permitting disclosure of the confidences or secrets of a former client whose representation did not give rise to the implications of impropriety by the attorney, the Committee believes that such disclosure would not comport with the dictates of Canon 4.

[8] A similar line has been drawn with respect to the determination whether an attorney may reveal information that is otherwise privileged. Weinstein, *Evidence* §503(d)(3)[01] at pp. 503-62, n. 2; McCormick, *Evidence* §91 at 191 (2d Ed. 1972).

cause for the dismissal was stated. According to the former attorney, his client expressed appreciation for his services at the time he terminated the engagement, and the former lawyer believes the change in counsel was prompted solely by the desire to "defer payment of the fee." The former attorney has in his possession some material of an unspecified nature ("the file") that may be either "helpful" or "necessary" to new counsel in commencing litigation that the former attorney had not yet instituted. We are asked to opine on the propriety of the former attorney's ethical right to invoke a retaining lien to maintain possession of the file.

Discussion

I. Assertion of Retaining Lien When Effect Will Be to Inconvenience Client.

The starting point of our analysis is the exhortation in the Code of Professional Responsibility to avoid controversies with clients over fees, if possible:

> A lawyer should be zealous in his efforts to avoid controversies over fees with clients, and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client. EC 2-23.

The Code, however, expressly recognizes that a lawyer may ethically acquire a "lien granted by law to secure his fee or expenses."[1] This provision of the Code refers to the common law "charging lien" and "retaining lien." It is the retaining lien that is pertinent to the inquiry.

Historically, the "retaining lien" evolved as a recognition of an attorney's right to hold former client's papers, property, and funds in order to compel the payment of legal fees owed to the attorney. District of Columbia law has long recognized the existence and propriety of the attorney's retaining lien. *See McPherson* v. *Cox,* 96 U.S. 404, 417 (1878); *Lyman* v. *Campbell,* 87 U.S. App. D.C. 44, 45-46, 182 F.2d 700, 701-702 (1950); *Beardsley* v. *Cockerell,* 240 F. Supp. 845 (D.D.C. 1965); Grabowsky, *Attorney's Liens,* 2 Dist. Law. 4 (April 1978).

In his article, the Bar Counsel summarized the law in this jurisdiction:

> "A retaining lien is the right of an attorney to retain possession of a client's documents, money, or other property which comes into the hands of the lawyer professionally until the general balance due him for legal services is paid. The retaining lien secures not only the costs and charges of a particular case but extends to the general balance due the attorney by his client." *See* Grabowsky, *supra.*

The retaining lien has been extended, without much discussion, to cover not only the client's own documents and funds but also the work product of the attorney, including all documents he prepares in the course of the representation.[2]

Although the principle may sound harsh, it is similar to the rights long recognized by the common law to insure payment for services rendered by persons in other occupations and professions. Moreover, the retaining lien must be viewed against the backdrop of DR 2-106(A), which prohibits a lawyer from charging or collecting "an illegal or clearly excessive fee." Furthermore, DR 2-110(A)(2) requires that, upon withdrawal, a lawyer must refund any portion of a fee that has not been earned. Thus, the Code surrounds the retaining lien with safeguards against its abuse.

In addition, the retaining lien must also be evaluated in light of EC 2-23, quoted above, which generally urges lawyers to avoid confrontations with their clients over fees unless the circumstances indicate that the client is guilty of "fraud or gross imposition." Thus, for purposes of considering the propriety of the actual assertion of a retaining lien, we must assume that the fee in question is reasonable, that it relates to professional services actually rendered, and that the client's refusal to pay is reasonably regarded as improper.

Under these assumptions, the clear prospect that assertion of the lien will cause the client inconvenience is ethically irrelevant. As the Court of Appeals for the Second Circuit pertinently explained in *In re San Juan Gold, Inc.,* 96 F.2d 60 (2d Cir. 1938):

> "[T]he right to retain the [client's] papers is valuable to the attorney in proportion as denial of access to them causes inconvenience to the client.... The attorney's lien cannot be disregarded merely because the pressure it is supposed to exert becomes effective. *Id.,* 96 F.2d at 60.

The inconvenience caused by the retaining lien is deemed to serve an ethical purpose by protecting the right to fair compensation for legal services performed for that client. As EC 2-17 explains, "adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession." If the client feels no inconvenience, the lien is made "practically worthless" and the attorney may be left with no just means to enforce payment of his fees.[3] Indeed, in light of the desirable policy contained in the Code discouraging lawyers from suing their clients over unpaid fees, the assertion of a retaining lien may be not only the most practical method for protecting the lawyer's legitimate rights but also may be the most discreet way of doing so.[4]

II. Restrictions on Ethical Right to Rest on Retaining Lien.

The right to assert a retaining lien is not absolute, even where the factors discussed above are present. The attorney's right must be balanced against the directive in DR 2-110(A)(2) that:

> "A lawyer shall not withdraw employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including...delivering to the client all papers and property *to which the client is entitled*..." (emphasis added).

Although this rule establishes a general policy, the italicized language demonstrates that the lawyer's duty to his former client will vary with the circumstances.

First, the rule is addressed *primarily* to the situation in which it is counsel's decision to withdraw from representation, even though it also applies when a client exercises his right to replace his counsel, a right he may exercise with or without cause. There is some authority that a lawyer forfeits his right to a retaining lien if he decided to withdraw from the representation and does so without just cause or reasonable notice.[5]

Second, DR 2-110(A)(2) necessarily implies that the lawyer may have possession of papers and property that belong to the client but that the client may not have the right to demand. As we read the rule, this implication allows the lawyer to assert a retaining lien when the circumstances discussed above warrant it. Even under those circumstances, however, there are at least three instances in

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[1] DR 5-103(A) reads:

"A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

"(1) Acquire a lien granted by law to secure his fee or expenses."

EC 5-7, reads in part:

"However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of the litigation."

[2] *See Attorney's Retaining Lien Over Former Client's Papers,* 65 Colum. L. Rev. 296, 299 (1965) (hereinafter *Columbia Retaining Lien Note).*

[3] *See* Davis v. Davis, 90 F. 791, 792 (C.C.D. Mass. 1898): "The value of the lien often lies almost altogether in the power to withhold the papers from use as evidence, and that the debtor client should be allowed by a subpoena duces tecum to make practically worthless his creditor's lien seems to me unjust."

[4] A 1958 opinion of the Connecticut Bar's Ethics Committee, involving a client who was dissatisfied with his lawyer and exercised his right to replace him, took a somewhat different approach:

"Where retention of the file does not jeopardize the client's interest, the lien right may properly take precedence. That is to say, where retention of the file may delay the client in the pursuit of his goal, but will not make it less obtainable, such retention is not ethically objectionable." 32 Conn. B.J. 86, 87 (Opinion No. 7, 1958).

To the extent that serious inconvenience to the client required the former lawyer to yield his lien, the committee concluded that the new counsel assumed the duty to protect his predecessor's right to his fee.

[5] *E.g.,* Matter of Kaufman, 567 P. 2d 957, 960 (Nev. 1977); *see Columbia Retaining Lien Note* at 304.

which the lawyer's right must yield to the client's interest.[6]

(a) *Where Adequate Security is Given.* The purpose of the retaining lien is to secure payment of reasonable fees due for past services. The resulting interference with the client's rights is only an unpleasant means to that end, not an independently justifiable manifestation of pique or rancor. Thus, if the client gives *other* adequate security for alleged indebtedness while the fee dispute is being resolved, the lawyer's right to continue to retain the file evaporates. See Ass'n of the Bar, City of N.Y., Ethics Opinion No. 808 (1955); *cf.* ABA Formal Opinion No. 209 (1940).

Where the client is involved in litigation that would be severely delayed by a retention of fees, the courts either suggest or require the abandonment of the lien if the client offers appropriate security. *See, e.g., Morse* v. *Eighth Judicial District Court,* 65 Nev. 275, 195 P.2d 199 (1948), where a retaining lien was "withdrawn in favor of adequate security" because of the "intolerable" court delay in the pending litigation that would otherwise result.[7] In *Morse,* the client discharged the attorney and refused to pay fees, claiming the attorney had mishandled his claim. The Supreme Court of Nevada held that the fee dispute was not a matter which should delay pending litigation when adequate security was available:

> "The main litigation might in such case be delayed for months, perhaps years. Such a situation would be intolerable. Though some authorities have frowned upon the practice of ordering the attorney to deliver documents or other property of the clients (thus discharging the attorney's retaining lien) upon giving bond or other security, a case like that presented here finds no other satisfactory solution." 195 P.2d at 205.

(b) *Where the Client Cannot Afford to Pay.* A client has a virtually unconditional right to discharge his lawyer, even without cause. The exercise of the right may be burdened by the obligation to pay the fees already generated and that obligation may be enforced, as we have seen, by the assertion of a retaining lien. If the client is impecunious, however, it would serve no legitimate purpose to allow the former lawyer to withhold the client's file. In that event, the assertion of the lien would operate solely to frustrate the client's right to change counsel and to receive effective representation from new counsel who, by hypothesis, is prepared to handle the matter without a fee. Accordingly, the weight of authority holds that the former lawyer must relinquish the file when, as a practical matter, his client cannot pay the outstanding fee.[8]

(c) *Where the File is Necessary to Defend Against a Serious Criminal Charge.* The prevailing view is that "mere" interference with the client's ability to assert or defend his rights in litigation, even if the interference is critical, is not sufficient to override the retaining lien.[9] The courts have repeatedly indicated that the retaining lien is a proper means for an attorney to obtain payment of fees and should be upheld in most cases where the attorney provided proper services.[10] If the papers being retained are needed for court actions that are to be commenced or that are already underway, then the determinant is the type of litigation involved. If only a civil claim rather than a criminal prosecution is involved, the lien will ordinarily be respected. Under the Code, therefore, the lien may ethically be invoked even where the file would be "necessary" to the new counsel's performance of his function either as a legal advisor or as an advocate in litigation.

There is some authority, however, that where a file is needed for the client's defense against a criminal charge of murder or other serious offense, the respective interests at stake require the former attorney to deliver the file to his successor.[11] In our view, this resolution of the balance is ethically sound; it would be improper for a lawyer to expose his client to criminal conviction by invoking a retaining lien in order to secure payment of a legal fee. In this respect, we conclude that representation in criminal proceedings is decisively different from other types of representation. Where the file is pertinent to a serious criminal charge, the normal rule that a lawyer may withhold a file even when it is "helpful" or "necessary" to the new counsel's representation must give way. Moreover, the special concern with personal liberty that has led to the "serious charge" restriction upon assertion of a retaining lien also applies to other situations, like habeas corpus proceedings or deportation proceedings involving personal liberty.

III. Avoidance of "Foreseeable Prejudice."

In the preceding section we have sketched the principal circumstances in which the foreseeable prejudice to the client's interests may *require* the attorney to yield the lien. As discussed above, the Code of Professional Responsibility recognizes the attorney's right to invoke a retaining lien even when it would prejudice his client's interests. Nevertheless, the directive in DR 2-110(A)(2) that a lawyer withdrawing from a matter take reasonable steps to avoid "foreseeable prejudice" to his former client should guide the lawyer's conduct in exercising his legal rights.

We believe the lawyer has the obligation to attempt to minimize the interference with his client's interests that may result from a change in counsel, even when a fee remains unpaid. It is the lawyer who must take the initiative in exploring whether circumstances may justify assertion of a retaining lien and whether there are alternatives that will reduce or eliminate the potential prejudice. For example, we adopt the view often expressed by the courts that an attorney should reach an agreement, if at all possible, that substitutes some other security for possession of the client's papers, pending resolution of a fee dispute. An agreement of that sort would prevent unnecessary delays in the courts and avoid needless interference with the client's legitimate interests.

Adequate security, however, may not always be available to the attorney, and when it is not the lawyer must use his sound discretion in deciding whether to relinquish his client's papers. The relationship between an attorney and his client is more than a business relationship. The mere existence of a legal right to a retaining lien, which the lawyer may assert without offending the Code, does not *require* the lawyer to stand on that right.[12]

A proper sense of regard for the nature of the profession should lead a lawyer to evalu-

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[6] *See generally Attorney's Retaining Lien Over Former Client's Papers,* 65 Colum. L. Rev. 296 (1965) (hereafter "Columbia Retaining Lien Note"). That Note also describes a fourth situation, not suggested by the present inquiry: the public policy in favor of probating a will normally prevents the attorney from asserting a retaining lien in order to secure payment of a deceased client's unpaid legal fees.

[7] *See also* Ross v. Wells, 6 Ill. App. 2d 304, 127 N.E. 2d 519 (1955); *Columbia Retaining Lien Note* at 302; *Attorney vs. Client: Lien Rights and Remedies in Tennessee,* 7 Memphis St. U.L. Rev. 435, 440 (1977).

[8] *See Columbia Retaining Lien Note* at 306-307. This view is not inflexible, however, for Courts have sustained the attorney's right to assert a retaining lien against the former client's trustee in bankruptcy. *See, e.g.,* In re San Juan Gold, Inc., *supra,* where the court held that bankruptcy of the client did not invalidate a retaining lien on the client's papers:

> "In the case at bar the trustee argues that the debtor has insufficient funds either to pay or to provide security for the appellant's fee. The record contains no evidence that the debtor is without funds, but however, this may be, the fact is immaterial. Nor is it material that the debtor's reorganization proceedings may be thwarted, if access to the papers is denied." 96 F.2d 60.

[9] *See* In re San Juan Gold, *supra,* at 61: "If it is worth anyone's while to have the...proceedings continue and the papers are essential to that end, the necessary funds to obtain their release may be forthcoming; if not, the debtor...must do without them." *Accord,* Beardsley v. Cockerell, *supra,* 240 F. Supp. at 847-48.

[10] *See, e.g.,* McPherson v. Cox, *supra;* Lyman v. Campbell, *supra;* In re San Juan Gold, *supra; The Flush,* 277 Fed. 25 (2d Cir. 1921); Beardsley v. Cockerell, *supra;* Davis v. Davis, *supra.*

[11] *E.g.,* Hauptmann v. Fawcett, 243 App. Div. 613, 276 N.Y. Supp. 523, *modified,* 243 App. Div. 616, 277 N.Y. Supp. 631 (2d Dep't 1935); *see Columbia Retaining Lien Note* at 305-306.

[12] The accounting profession takes the position that it is unethical as an "act discreditable to the profession," for an accountant to assert a retaining lien, even if recognized by law. *See* AICPA Code of Professional Ethics, Interpretation 501-1; National Ass'n of State Boards of Accountancy, Model Code of Professional Conduct, Rule 302.

ate his financial interests in light of the interests of the client. If the exercise of the retaining lien would have a serious impact on the client's ability to assert or defend an important interest, the lawyer should be hesitant to invoke the lien. Circumstances in which he would be warranted in doing so under the present Code would be where his financial interest clearly outweighs his former client's interest, or where the client's resual to pay the outstanding fees constitutes a gross imposition. Otherwise, the lawyer should renounce the lien.[13]

Opinion No. 60

Re: Imposition of Interest Charge on Client's Delinquent Account Without Advance Agreement of Client; Referral of Delinquent Account to Collection Agency; Suit to Collect Fee

Issues

An attorney asks us three questions related to his firm's recent "considerable difficulty with regard to delinquent accounts."

First, the inquiring attorney asserts that, "even without any prior agreement (written or oral), one who engages the services of a professional should understand that such services must be paid for within a reasonable length of time;" in this context, the attorney requests that we provide a "formal opinion" concerning the propriety of placing on debit notes and statements and enforcing the following notice:

> An interest charge in the amount of 1.5 percent per month on the unpaid balance will be imposed on all amounts delinquent in excess of 120 days.

Second, the attorney asks whether it is acceptable for attorneys to hand over delinquent accounts, "e.g., those over 120 days in arrears," to a collection agency and, if so, what criteria are appropriate in selecting an acceptable collection agency. Alternatively, "Is there an approved list?" our inquirer asks.

Third, the attorney inquires as to the propriety of bringing suit to collect on accounts which are over 120 days in arrears.

These issues raise questions which frequently recur in the course of attorneys' financial management of their law practice. Not surprisingly, they are issues which previously have received the attention of both this Committee and the American Bar Association Committee on Ethics.[1] Having considered relevant provisions of the Code of Professional Responsibility, as well as prior opinions of both Committees, we conclude:

(1) While the imposition of a finance charge or interest on unpaid fees for legal services is not in violation of the Code of Professional Responsibility, such a charge may only be imposed if clearly agreed to by the client, in advance of representation in a case.

(2) An attorney may refer delinquent accounts to a collection agency, provided that the collection agency conforms its business activities to the statement of principles adopted by the American Bar Association with reference to the "proper activities of collection agencies from the standpoint of the unauthorized practice of law." *See* Martindale-Hubbell, Vol. VII, pp. 75M-76M (1978 Edition).

(3)While the Code of Professional Responsibility does not proscribe the institution of a law suit by an attorney to collect on an account which is in arrears, the attorney should be zealous in attempting to resolve amicably differences concerning the payment of fees, and should not sue a client for a fee unless the law suit is necessary to prevent fraud or gross imposition by the client.

Discussion

The first question raised by this inquiry, concerning the propriety of charging interest on unpaid accounts, and the proper rate of interest, has been disposed of for the most part by Opinion No. 11 (November 24, 1975). There we stated:

> The most closely applicable provision of the Code of Professional Responsibility is: DR 2-106(A), which states merely that a lawyer shall not charge "an illegal or clearly excessive fee." We do not believe that the imposition of a finance charge or interest on unpaid fees for legal services is a violation of DR 2-106(A).

However, the instant inquiry, while not entirely clear, suggests that there may have been no prior written or oral agreement between the inquiring attorney and his clients concerning the imposition of an interest charge on accounts in arrears. In the absence of such an agreement at the inception of an attorney's representation of a client, either as part of or in addition to an agreement with reference to fees, we believe that the imposition of an interest charge is improper. Again, reference to Opinion No. 11 is helpful:

> Though no canon or disciplinary rule speaks explicitly to the matter of interest on unpaid fees, the customary practice of lawyers has been not to make such charges. We believe that a departure from that custom is proper *only if clearly agreed to by the client, in advance of representation or in advance of a new stage of representation.*
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> ****
>
> In considering whether legal fees may properly be financed through bank credit cards, the ABA Committee on Ethics and Professional Responsibility has stated that interest may be charged on delinquent accounts: *"Providing the client is advised that the lawyer intends to charge interest and agrees to the payment of interest on accounts that are delinquent for more than a stated period of time."* ABA Formal Opinion No. 338, November 16, 1974. We do not advocate the charging of interest on unpaid legal fees, but we agree with the basic approach of ABA Formal Opinion No. 338 as to the permissibility of such charges and *the necessity for a clear understanding on the part of the client that they will be imposed.* (Emphasis added.)

With reference to the proper rate of interest, we observed in Opinion No. 11:

> DR 2-106(A) prohibits charging an illegal fee. Any lawyer contemplating the charging of interest or a finance charge should scrupulously observe the requirements of the usury and consumer protection laws. See D.C. Code, Title 28, Chapter 33 and 38; 15 U.S.C. Chapter 41. The question whether an interest or finance charge [which] is non-usurious and does not violate consumer protection laws may nevertheless be "clearly excessive," in violation of DR 2-106(A), would depend on all the circumstances of a particular case.

With reference to the second question raised by this inquiry, concerning the propriety of referring delinquent accounts to a collection agency, there appears to be no provision of the Disciplinary Rules or ethical considerations directly in point.[2] Rather, the relevant consideration concerning referral of delinquent accounts to a collection agency are set out in the "Statements of Principles with Respect to the Practice of Law" formulated by representatives of the ABA and collection agencies. *See* Martindale-Hubbell, Vol. VII, pp. 75M-76M (1978

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[13]Because the Committee has serious doubts about whether the Code should continue to permit lawyers to assert retaining liens, this question has been referred to the Code Subcommittee for development of a possible amendment to the Code.

[1]Recently the view of attorneys concerning law suits to collect fees were surveyed in "The Client As Deadbeat: When to Sue" by James Granelli (*National Law Journal,* Jan. 8, 1979, p. 1).

[2]DR 3-102(a) declares that "a lawyer or law firm shall not share legal fees with a nonlawyer" (with the exceptions that are not relevant here), so that it might first appear to be improper for an attorney to reach an agreement with a collecting agency to share a percentage or a portion of a fee as compensation for the agency's services in attempting to collect a fee. However, the approval by this Committee and the ABA Committee on Ethics and Professional Responsibility of the use of credit cards to pay for legal services (see this Committee's Opinion No. 23, December 17, 1976, and Formal Opinion No. 338 of the ABA Committee, November 16, 1974), represent an implicit acknowledgement of the propriety of attorneys referring fee collection matters to an agency, part of whose practices may involve fee collection. Moreover, the ABA Committee has also concluded that "there does not appear to be anything inherently unethical in an arrangement under which a collection agency in effect extends credit to its customer by advancing and paying for the account of the creditor the fees of an attorney who performs legal services for the creditor in connection with a claim, if the agency is fully reimbursed by the creditor for fees paid to the attorney in the exact amount of such fees and at the time of reimbursement the amount of the fees is separately identifiable or segregated from amounts paid by the creditor to the agency for its own services as distinguished from the attorney's legal services." ABA Informal Opinion No. 735, May 19, 1964. *See also* ABA Formal Opinion 320, February 19, 1968; ABA Informal Opinion No. 751, June 17, 1964.

Edition). Those principles, to which we subscribe, are as follows:

1. A collection agency may engage in the business of collecting past-due accounts for customer-creditors (hereinafter "creditors") provided, however, that the agency may not:

   (a) Furnish legal advice or perform legal services or represent that it is competent to do so, or institute judicial proceedings on behalf of creditors or other persons;

   (b) Communicate with debtors in the name of an attorney or upon the stationery of an attorney, or prepare any forms of instrument which only attorneys are authorized to prepare;

   (c) Solicit and receive assignments of accounts for the purpose of suit thereon;

   (d) In dealing with debtors employ instruments simulating forms of judicial process or forms of notice pertaining to judicial proceedings, or threaten the commencement of such proceedings;

   (e) Solicit accounts for the purpose of having any legal action or court proceedings instituted thereon or solicit accounts for any purpose at the instigation of any attorney;

   (f) Employ or terminate the services of attorneys or arrange the terms or compensation for such services on behalf of creditors without written authority to do so;

   (g) Intervene between creditor and attorney in any manner which would control or exploit the services of the attorney or which would direct those services in the interest of the agency;

   (h) Demand or obtain in any manner a share of the proper compensation for services performed by an attorney in collecting an account, irrespective of whether or not the agency may have previously attempted collection thereof.

2. An agency may properly agree with creditors that the agency's compensation will be contingent on success in collecting accounts, and the measure of compensation may be a percentage of the amount collected.

3. When authorized by a creditor it is proper for an agency to recommend an attorney or attorneys to the creditor and to transmit accounts on behalf of the creditor to any attorneys so recommended on terms and conditions authorized by the creditor.

4. When authorized by a creditor, it is proper for an agency as agent for the creditor, to conduct correspondence of a routine nature (such as inquiries and reports with respect to status of the claim) on behalf of the creditor with the attorney to whom the creditor's account has been transmitted for collection, and, in general, to carry on activities similar to those ordinarily carried on by the collection department of a creditor organization provided that the attorney shall be free at all times to communicate with the creditor and provided further (i) that the agency may not attempt to control or in any wise suggest or imply that it has any right to control the actions of the attorney or otherwise interfere with the attorney-client relationship between the creditor and the attorney, and (ii) that decisions as to the manner in which the claim is to be handled by the attorney, whether suit is to be brought, the claim is to be compromised or settled, whether the claim is to be returned, and any other matters requiring the decision of the creditor shall in each instance be left solely to the creditor and the attorney in direct communication with each other when the attorney so desires and the attorney shall be so advised in the forwarding letter. Copies of correspondence between the attorney and the agency need not be forwarded to the creditor unless the creditor requests otherwise. When the agency receives from the attorney an accounting concerning a collection made by the attorney, such accounting or the details thereof shall be promptly transmitted by the agency to the creditor.

The subject raised by the third part of the inquiry before us, concerning the propriety of a law suit to recover delinquent debts, is addressed by Canon 14 of the former Canons of Professional Ethics of the ABA, which provided:

> Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self respect and with his right to receive reasonable recompense for his services; and law suits with clients should be resorted to only to prevent injustice, imposition or fraud.

A 1943 opinion of the ABA Ethics Committee interpreting Canon 14 emphasized that the practice of law "is a learned profession, not a mere money-getting trade," and that

> [s]uits to collect fees should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment. Formal Opinion No. 250, June 26, 1943.

While Canon 14 has not been enacted as a Disciplinary Rule, ABA ethical consideration 2-23 provides:

> A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

Consequently, while law suits by attorneys to collect delinquent accounts are not favored, it appears that such suits are not prohibited under the Code of Professional Responsibility. However, such litigation should only be a last resort to collect a delinquent fee where an attorney has made every effort to settle amicably with his client any differences concerning either the amount of or the timing of the collection of fees.

Inquiry No. 78-11-22

Opinion No. 62

Canons 2, 5 and 9, EC 2-25, EC 5-14, DR 5-105, DR 5-106—Propriety of Participation by Federally-Employed Attorneys in Volunteer Program to Represent Interests of Abused and Neglected Children in Proceedings Before the Superior Court of the District of Columbia

The inquirer represents a program in the Superior Court of the District of Columbia which seeks to obtain volunteer attorneys to represent neglected and abused children in proceedings before that Court. Attorneys who are employed by the federal government are potential participants as volunteer attorneys, and the inquirer asks whether such federally-employed attorneys may participate in the program. Attorneys representing children may at some point in their representation oppose the position of a District of Columbia government social worker, or an Assistant Corporation Counsel for the District of Columbia.

The Code of Professional Responsibility strongly encourages attorneys to participate in the programs designed to make counsel available to all who require such counsel. Canon 2 specifies that "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available." EC 2-25 notes the obligation of every lawyer, "regardless of professional prominence or professional workload," to "find time to participate in serving the disadvantaged." The program described by the inquirer appears to be the kind of volunteer-service program which deserves the support of the legal profession. Accordingly, participation in the program by members of the bar, unless proscribed by some other ethical constraint, is not only consistent with the Code of Professional Responsibility but also highly laudable.

The only possible ethical proscriptions which might bar such activity are those arising under Canons 5 and 9. Canon 5 requires an attorney to exercise independent judgment on behalf of a client. The exercise of independent judgment is called into question when an attorney accepts or continues employment which will or may adversely affect his judgment on behalf of, or dilute his loyalty to, a client. The ability of a lawyer to exercise independent professional judgment is called into question when "a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant." EC 5-14.

The representation of neglected and abused children in proceedings before the Superior Court of the District of Columbia does not appear to involve the representation of differing interests where the attorney involved is a lawyer-employee of the federal government. Certainly representation of the best interests of such children is not likely to be adverse to any proper interest of any federal department or agency. Further, the interests involved in the particular proceeding must be viewed as quite remote from the particular interests of virtually every federal agency, department, or subordinate organization. While it may be that some particular organizational element of a specific agency or department has a specific interest in a proceeding in the Superior Court, or in an

issue raised in such proceeding, so as to call into question the propriety of an attorney employed by such organizational element undertaking the representation of a child in the Superior Court, such situations must be viewed as the exception and not the rule. There would, therefore, be no occasion to question, in most cases involving volunteer representation by federally-employed attorneys, their ability to represent the child without impairing their professional judgment. See DRs 5-105, 5-106.

The other potentially applicable ethical restriction is that of Canon 9, which exhorts lawyers to avoid "even the appearance of professional impropriety." No problem of improper appearances would appear to be involved where a federally-employed attorney seeks to advance the interests of an allegedly abused or neglected child before the Superior Court.

Accordingly, the Committee concludes that, with limited exceptions of the kind suggested above, there are no ethical prohibitions which would impair the ability of federally-employed attorneys to volunteer their services on behalf of children requiring representation in the Superior Court. To the contrary, such volunteer representations are to be encouraged and commended as fulfilling the responsibilities of the bar to make counsel available to all who need it.[1]

Opinion No. 63

DR 4-101(B); EC 4-5, EC 4-6, EC 5-1, EC 5-14; Canons 4, 5—Representation of Client in Administrative Proceeding Where Former Client in Unrelated Criminal Case May Be Hostile Witness

The inquiring attorney in this matter represents a Deputy United States Marshall in an administrative proceeding in which the Deputy is alleged to have violated Department of Justice regulations by firing his weapon when a criminal defendant in a courtroom failed to respond to his order to halt. The attorney asks whether he properly may continue to represent his client after discovering that he previously represented the criminal defendant five months earlier in an apparently unrelated matter in which the defendant was convicted.

The attorney states that the investigation of his client's actions by the United States Marshals Service did not include an interview with the defendant whom the attorney previously represented, nor has any statement been made by the defendant. The inquirer speculates, however, that he may be called upon to cross-examine the defendant during the administrative proceedings involving his client.

We conclude that, in the circumstances presented by the inquiry, there would be no violation of the Code of Professional Responsiblity in the continued representation by the inquiring attorney of his client, so long as: (1) the attorney is not compelled, in the interest of his client, to use information acquired in the course of his earlier representation of the defendant to the disadvantage of the defendant in the administrative proceeding, including during any cross-examination of the defendant; (2) the attorney's representation of his client does not require disclosure to the client of the confidences or secrets of the defendant; and (3) the lawyer's representation of his client is not in any other manner substantially related to his prior representation of the defendant or otherwise compromised by any continuing loyalty or obligation to the defendant.

The Disciplinary Rules and ethical considerations which control our disposition of this inquiry are subsumed in Canons 4 and 5 of the Code of Professional Responsibility, which exhort lawyers to "preserve the confidences and secrets" of their clients, and to "exercise independent professional judgment" on their behalf. More particularly, DR 4-101(B) precludes a lawyer (with exceptions not relevant here) from revealing a confidence or secret of his client, using such a confidence or secret to the disadvantage of the client, or using such a confidence or secret for the advantage of himself or of a third person without the client's consent following full disclosure. Supporting ethical considerations under Canon 4 admonish lawyers not to "use information acquired in the course of the representation of a client to the disadvantage of the client," to exercise care "to prevent the disclosure of the confidences and secrets of one client to another," to accept no employment that "might require such disclosure," and to heed the obligation "to preserve the confidences and secrets of a client even after the termination of employment." See EC 4-5 and EC 4-6.

As Canon 4 and its ethical underpinnings urge the lawyer to act with discretion in matters concerning his client, the ethical considerations under Canon 5 urge that the lawyer also act with independence.

> The professional judgment of a lawyer should be exercised, within bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. EC 5-1.

Where the interests of multiple clients are involved,

> maintaining the independence of professional judgments required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant. EC 5-14.

In the matter before us, we are assured by the inquirer that, to the best of his knowledge, the criminal defendant's recent presence in court on the occasion of the Deputy Marshal's firing of his weapon was in no way related to the case in which the inquirer earlier represented the defendant. Consequently, we assume that there not only exists no substantial relationship between the attorney's present representation of his client and his past representation of the criminal defendant[1], but that there are no potential compromising influences or loyalties which may adversely affect the lawyer's judgement on behalf of, or dilute his loyalty to, his present client under Canon 5.

Similarly, the lawyer's ability to act with the requisite discretion prescribed by Canon 4 would appear to be affected only by the possibility that his cross-examination of the defendant might require him to use or disclose privileged information obtained during the course of his earlier representation of the defendant. Interpreting the predecessor of Canon 4, the ABA Committee on Professional Ethics has opined that "an attorney must not accept professional employment against a client *or a former client* which will,

[1]This opinion addresses only issues arising under the Code of Professional Responsibility. It does not consider whether a government employee participating in a volunteer program of the kind described might violate some provision of the federal conflicts-of-interest laws (Title 18, Chapter 11, United States Code). See, e.g., 18 U.S.C. §205, which provides that no "officer or employee od the United States in the Executive, Legislative or Judicial branch... or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties" is allowed to act as agent or attorney for anyone before "any department, agency, *court*, court-martial... in connection with any proceeding... controversy, charge, accusation, arrest or other particular matter in which the United States is a party or has a direct and substantial interest."

[1]The "substantial relationship" test, first explicated by Judge Weinfeld in T.C. Theatre Corp. v. Warner Brothers Pictures, 113 F. Supp. 265, 268-269 (S.D.N.Y. 1953), has become "the accepted standard for disqualification under Canon 4." Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 Nw. U.L. Rev. 996, 998 (1979), and cases cited at 998 n.11. Under this standard, a motion by a former client to disqualify an attorney on the opposing side of a case will be successful so long as the matters embraced within the pending suit wherein his [the movant's] former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him (the former client). T.C. Theatre v. Warner Brothers Pictures, *supra*.

Recent cases applying and, in some respects, limiting the scope of applicability of the "substantial relationship" test include: Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp. 518 F.2d 751 (2nd Cir. 1975), *aff'g*, 370 F. Supp. 581 (E.D.N.Y. 1973); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2nd Cir. 1976); United States Industries, Inc. v. Goldman, 421 F. Supp. 7 (S.D.N.Y. 1976); Baglini v. Pullman, Inc., 412 F. Supp. 1060 (E.D.Pa.) *aff'd mem.*, 547 F.2d 1158 (3d Cir. 1976); *Compare* Westinghouse v. Kerr-McGee Corp. 580 F.2d 1311 (7th Cir.), *cert. denied*, 99 S.Ct. 353 (1978).

or even may, require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment...." ABA Formal Opinion 161 (1936). (Emphasis added.) In a similar vein, the Committee concluded that the client's privilege not to have confidential communications between an attorney and client disclosed "outlasts the attorney's employment." ABA Formal Opinion 154 (1936).

However,

> [t]he test of inconsistency is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formally represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection. Drinker, *Legal Ethics*, 112, quoting from *In Re Boone*, 83 F. 944, 952-953 (1897).

Consequently, so long as the inquiring attorney is able to and does comply with the strictures of Canons 4 and 5 and their underlying ethical considerations, alluded to above, during the course of his representation of the Deputy Marshall, both in his cross-examination of his former client and in avoiding any other use of information acquired in the course of that earlier representation, we conclude that there is no violation of the Code of Professional Responsibility in his continued representation of his present client.

Opinion No. 64

DR 2-103; EC 2-1—Law Students in Court Program; Use of Information Desk in Courthouse

An opinion has been requested of the D.C. Bar on whether the Law Students in Court Program, which furnishes legal assistance without compensation to persons summoned before the Landlord-Tenant Branch of the District of Columbia Superior Court, may without violating ethical restrictions against solicitation either hire a person who will inform tenants about the availability of the legal assistance offered by the Program or have the law students themselves advise the tenants that such assistance is available through the use of an information desk at the courthouse. We conclude that the Code of Professional Responsibilty does not prevent the type of information dissemination in question.

The Law Students in Court Program is a creature of the Consortium of Universities. Participating schools include the American University, the Catholic University of America, the George Washington University, Georgetown University and Howard University. The Program, recognized in the Superior Court Rules, utilizes the services of law students under the supervision of three staff attorneys and, upon appointment by a Superior Court judge, the law students provide legal assistance in both civil and criminal contexts. The legal assistance involves not only advice and consultation but also the trial of selected cases as well as briefs and arguments in the District of Columbia Court of Appeals.

An opinion has been requested on whether any ethical violations would result if the program established an information desk in the Landlord-Tenant Court so that tenants would be aware of the program at an earlier stage in the proceedings than is now the case.[1] It is said that Chief Judge Moultrie of the Superior Court has no objection to the establishment of such an information desk, and this opinion does not address the desirability of doing so. Rather, it concerns itself only with the ethical implications of such a service.

The areas of concern center on the rules concerning solicitation and the possibility that such overt conduct may involve the common law crime of champerty. We think that under the Code of Professional Responsibility as it exists in the District of Columbia the answers are clear that the contemplated conduct does not run afoul of those restrictions.

DR 2-103 as currently existing in the District of Columbia prohibits solicitation, assisting an organization that provides legal services, or accepting employment as a lawyer after having suggested a need for legal representation only if some other wrong is associated with that conduct, such as false or fraudulent statements to the potential client, the use of undue influence, coercion, intimidation and the like, or paying someone to recommend the lawyer to the potential client. The conduct described in the inquiry involves no such activities, and as such the proposed information desk and its use do not violate ethical restrictions.[2]

The proposed conduct likewise furthers the aspirational values set out in EC 2-1:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laypersons to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. (Footnotes omitted.)

Finally, since champerty involves maintaining a suit in return for a financial stake in the outcome[3] and since the Law Students in Court Program does not charge fees to its clients, there is no real question of champerty.

In sum, we have reviewed the proposed program and are satisfied that it is wholly in compliance with applicable Disciplinary Rules, Ethical Considerations and pertinent case law.

Opinion No. 65

DR 2-108(A), DR 2-107—Employment Contract Between an Attorney Withdrawing From His Former Law Firm, Requiring Payment to Former Firm for Post-Withdrawal Fees Derived by Withdrawn Attorney from Client of Former Firm

The inquirer is presently employed as an attorney by a law firm in the District of Columbia. Pursuant to his employment by that firm, he signed an employment contract containing the following provision regarding termination:

> If termination of this agreement shall occur, (inquirer's name) agrees that if he or any employee or designee performs any legal work for a client of the firm during a two year period following such termination, he will pay to the firm or any successor of the firm 40% of his net billings to such clients for professional services during the said two year period.

The inquirer asks whether such a provision is consistent with the Code of Professional Responsibility.

That such a provision is ethically proscribed seems clear. Although the disciplinary rules under Canon 2 were recently modified by the District of Columbia Court of Appeals,[1] the court has retained a provision identical to former DR 2-108(A), currently found as DR 2-108(A), which states:

> A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

The quoted portion of the employment contract quoted above, while not in terms *prohibiting* a professional relationship between the withdrawing lawyer and clients of his former firm, is nonetheless a restriction on the right of a lawyer to practice law after the termination of the relationship created by the employment agreement. Its effect is

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[1]As of now, tenants may not be aware of the Program before the judge comes on the bench and announces it. The Citizens' Advisory Committee perceives that many tenants sign consent agreements with landlords' lawyers before court opens, thereby reducing the potential effectiveness of the legal assistance being proffered.

[2]See, In re Primus, 436 U.S. 412 (1978), and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), two recent Supreme Court decisions marking out the extent to which a state may legitimately restrict efforts at solicitation of legal services.

[3]In re Primus, *supra* at 424, fn. 15.

[1]Order of July 2, 1978.

to impose a barrier to the creation of a lawyer/client relationship between the departing lawyer and clients of his former firm. Such a barrier is inconsistent with the concept of the practice of law as a profession and at least indirectly interferes with clients' choice of an attorney. The contract provision purports to require payment of a substantial portion of any fees received from clients of the former firm without regard to any circumstances concerning creation of the attorney-client relationship. If, for example, a client of the former firm were to seek the services of the departing attorney because of dissatisfaction with the former firm, or for other reasons relating to the relative professional qualifications of the departing lawyer in relation to his former firm, payment pursuant to the provisions of the employment contract would, according to its terms, be required. The departing attorney would find work for clients of the former firm economically less attractive than work at similar rates received from other clients, and might be deterred from accepting employment from such clients. This economic disincentive could be eliminated only by charging excessively high rates in order to compensate for the payments which would be due under the terms of the employment contract.

This conclusion is compatible with that reached in Formal Opinion 300 (1961) by the ABA Committee on Ethics and Professional Responsibility. One ground for the conclusion of the ABA Committee in Opinion 300 —that former Canon 27 prohibited every form of solicitation of employment—is no longer applicable with the same force in view of the modifications of Canon 2 which have been prescribed by the District of Columbia Court of Appeals. However, the logic expressed elsewhere in that Opinion remains sound and supports the conclusion that the contract provision is inconsistent with the Code of Professional Responsibility.

The employment contract provision is also in violation of DR 2-107, which deals with the division of fees among lawyers. DR 2-107(A) provides as follows:

> A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
>
> (2) The division is made in proportion to the services performed and responsibility assumed by each.
>
> (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

Even if agreement of the client could be obtained, and the total fees charged were reasonable, the employment contract provision would violate DR 2-107(A)(2) because there is no provision for assuring a division of fees in proportion to services performed and responsibility assumed. Indeed, the employment contract provision does not appear to contemplate performance of any continuing services by the former law firm of the withdrawing attorney.

There is an exception to the limitations of DR 2-107(A), contained in DR 2-107(B):

> This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

In the view of this committee, this provision has no application to the current circumstances. It contemplates the situation in which an attorney withdraws from a firm with certain amounts due him or her with respect to work previously performed or other accrued rights. Under these circumstances, it is not unusual for payments to be made to the withdrawing or retiring attorney in order to produce an equitable resolution of financial arrangements between the departing or retiring attorney and his or her former firm. It was not the intent of DR 2-107(B) to exempt from the restrictions of DR 2-107(A) circumstances involving post-separation payments flowing from the withdrawing attorney to the former firm, relating to work performed by the withdrawing attorney after the date of withdrawal.

In summary, the employment contract provision cited by the inquirer violates the provisions of DR 2-108(A) and DR 2-107 (A).[1] It is therefore improper for a firm to require an employee-attorney to sign such a provision, and improper for such attorney to agree to such a provision.[2]

Inquiry No. 78-12-26
March 14, 1979

Opinion No. 66

DR 2-101(C)(4)—Advertising By Attorney; Sponsorship of Sports Team

A District of Columbia lawyer sponsors and manages a softball team in a public recreation league. He wishes to have the name of his law office appear on the back of the team's jerseys. We have been asked whether that type of notoriety would offend the recently amended provisions of Canon 2 dealing with advertising and publicity. We conclude that the Code does not prohibit the proposed display.

The amendments to Canon 2 generally reflect the constitutional policy that lawyers have a right to advertise the availability of their professional services so long as their statements are not misleading or overbearing. The new provisions also contain some other restrictions. The relevant provision of the amended disciplinary rules is DR 2-101 (C), which provides:

> "(C) A lawyer shall not, on his or her own behalf, or on behalf of a partner or associate, or any other lawyer affiliated with the firm, use or participate in the use of any form of public communication which:
>
> ***
>
> "(4) Is intended or is likely to attract clients by use of showmanship or self-laudation."

Since as a practical matter there will be no other explicit message conveyed about the professional services available, there is an initial question whether the mere display of the name of the lawyer's law offices on athletic jerseys constitutes a "form of public communication." It seems reasonable, however, to treat the proposed display as a form of public communication. Both the apparent purpose for displaying the name and the inevitable effect of doing so will be public awareness of the lawyer's professional practice.

For similar reasons, we assume that the proposed display is either "intended" or is "likely" to attract clients. Of course, it is possible to conceive of law firms whose practice would make it unrealistic to regard the sponsorship of a recreational sports team as either intended or likely to develop new clients, but the limited facts provided by the sole practitioner who has submitted the inquiry do not permit us to discount the possible presence of the intent and the effect specified by DR 2-101(C)(4). Even if we assume the existence of either the intent or the effect of generating clients, however, there is no necessary impropriety. Many lawyers engage in worthwhile civic and charitable activities with either the desire or the awareness that increased public perception of their activities may prove professionally productive.

In our view, the critical question is whether the possible attraction of clients would involve the "use of showmanship or self-laudation." Whatever may be meant by the term "self-laudation," the mere display of the name of a lawyer's law offices cannot be covered. Nor do we regard the proposed display as unethical "showmanship."

While softball is to one degree or another an entertaining spectator sport—depending, of course, on the quality of the players and the rest of the ambience—the display of the lawyer's professional name is merely incidental to the sport, not the focus of it. We believe that DR 2-101(C)(4) is intended to prohibit lawyers from using the techniques of the huckster to attract clients. For example, the Disciplinary Rule would bar a lawyer from retaining clowns to engage in street-corner antics as a device for publicizing the lawyer's services. There is, however, no hint of that type of tasteless sensationalism in the conduct proposed by the inquiring

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[1] The Committee has not been furnished the entire employment contract, and is therefore not in a position to determine whether other provisions of the contract have any bearing on the conclusions of the Committee.

[2] The Committee's opinion extends, of course, only to issues arising under the Code of Professional Responsibility as promulgated in the District of Columbia. The Committee expresses no view concerning any legal rights which may be created by the employment contract in question.

attorney.

Accordingly, we have no occasion to consider the extent to which constitutional principles may entitle a lawyer to use theatrical techniques in calling attention to the availability of his law practice. While the public display of the name of a law firm sponsoring a sports team may be unconventional, we do not regard it as posing any ethical problem

Adopted April 24, 1979

Concurring opinion by S. White Rhyne, Jr.:

The essential question is whether the use of the name of a law office on the back of a softball team's jerseys constitutes impermissible "showmanship." I concur in the opinion of the Committee because I believe the word "showmanship," unless limited in construction to the most egregious cases such as clowns on a street-corner, would be unfairly and perhaps constitutionally vague. I believe lawyers have a right to know where the line is being drawn before they are subjected to sanctions as serious as being deprived of their livelihood, at least where there is nothing inherently immoral or unethical about the conduct prohibited.

Nonetheless, I do believe that the advertisement here involved is probably the kind that *was* contemplated by the drafters of present DR 2-101(C) when they used the word "showmanship." That disciplinary rule must be read in light of the ethical considerations that precede it, particularly EC 2-8 and EC 2-8A. Those ethical considerations make clear that the reason for relaxation of the strictures against lawyer advertising was to facilitate the communication to members of the public of information useful in the selection of a lawyer. For instance, EC 2-8 says: "Selection of a lawyer by a layperson should be made on an informed basis." EC 2-8A says: "The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed." So far as is apparent from this opinion, the softball jerseys impart no information at all that is useful to a member of the public in selecting a lawyer.

In fact, anyone who would select a lawyer on the basis of a name on the back of a softball jersey would be doing himself a decided disservice. The advertisement here in question really falls within the ambit of language in EC 2-8A which recognizes that, in many instances, advertising "may hinder informed selection of competent, independent counsel."

Nevertheless, the ethical considerations are aspirational only. I concur with the majority that there is no violation of the disciplinary rules.

Opinion No. 67

DR 2-101, DR 2-101(B), EC 2-13—Use of the term "General Counsel"

An attorney who has been asked to serve on a pro bono basis as the legal advisor for a nonprofit organization asks whether he may consent to the organization using the term "General Counsel" in reference to the attorney where he will not be spending a majority of his time on the organization's legal matters. The attorney specifically inquires whether the words "General Counsel" constitute a "term of art," and under what circumstances, in both pro bono and fee-paying relationships, an attorney may agree to references to the attorney's status as "General Counsel."

There appear to be no provisions of the Disciplinary Rules or ethical considerations under the Code of Professional Responsibility which apply to the designation as "General Counsel" of an attorney who represents an organization, either in a fee-paying or pro bono relationship.[1] *See* ABA Informal Opinion 1061 (1968). Since the designation "General Counsel" normally applies to a lawyer who serves as the principal legal advisor to an organization, we conclude that so long as the inquiring attorney serves in that capacity, and his use of the term "General Counsel" does not mislead or deceive the public or potential clients concerning the lawyer's professional status or the particular field(s) of law in which the attorney practices,[2] the attorney's use of the term "General Counsel" does not run afoul of either the Disciplinary Rules or ethical considerations under the Code.

Opinion No. 68

DR 5-101(A)—Legal Advice Concerning Labor Relations Given By A Staff Attorney Who Is A Union Member—Conflict of Interest

We have been asked by a staff attorney in the Office of Center Counsel of a federal agency field installation whether he can ethically handle a certain legal matter that has arisen in his office. The inquirer is an assistant to the Center Counsel—legal counsel for the installation—in the two-lawyer Office of Center Counsel. As part of his duties, the inquirer gives legal advice to the Center management, much as in-house counsel provides legal advice to the management of a corporation.

The Department of Labor has determined that the position held by the inquirer falls within a particular bargaining unit, and the inquirer has joined the labor union which represents that bargaining unit. In fact, he is the union representative-at-large. The inquirer's supervisor, the Center Counsel, is designated as part of management, and is not a member of any bargaining unit or labor union.

A question has arisen concerning whether the time spent by security guards at the installation drawing weapons and changing into uniforms constitutes compensable time for the purpose of calculating overtime. Normally, legal advice concerning this question would be rendered by the inquirer, but the inquirer asks whether his own union membership in any way ethically precludes him from giving advice to Center management.

The inquirer points out that, although the security guards are represented by a union, by tradition and by statute, professional employees and security guards must be members of different bargaining units. In addition, the inquirer notes that at his installation the two bargaining units are represented by separate unions. Accordingly, the inquirer is not a member of either the bargaining unit or the union that is affected by the overtime question that has arisen. The inquirer also points out that because of different employment contracts and the different nature of the work involved, it is unlikely that advice he renders concerning overtime for security guards will have any application to his own entitlement to overtime compensation.

The ethical issue raised by this inquiry relates to whether the inquirer's own union membership will interfere with his ability to give his employer the benefit of his independent professional judgment. DR 5-101 (A) precludes a lawyer from "accepting employment" if the lawyer's independent professional judgment "will be or reasonably may be" affected by his or her own financial, business, property, or personal interest.[1] *See also* DR 5-105(A) and (C). But under the facts presented we need not determine whether the inquirer's independent professional judgment "will be or reasonably may be" affected by his labor union membership. DR 5-101(A), by its own terms, does not preclude employment when the client consents after full disclosure of any interests that could interfere with the independent exercise of the lawyer's professional judgment, and here the inquirer states

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[1]Several opinions of the ABA Committee on Ethics and Professional Responsibility have considered the propriety of the use of the term "General Counsel" on the letterhead of corporations or other organizations in the context of prior proscriptions in the Code against advertising. *See, e.g.*, Formal Opinion 285 (1951), Informal Opinion 1061 (1968), 645 and 645(a) (1963), 446 (1961). These opinions clearly have been overruled by recent amendments to the Code to the extent that the proscribed use of the term "General Counsel" was based upon former Code provisions which banned advertising. *See* DR 2-101.

[2]*See* DR 2-101(B) (defining "false, fraudulent, misleading, or deceptive" statements or claims); EC 2-13 (exhorting lawyers to be scrupulous in the representation of their professional status).

[1]DR 5-101(A) states:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

that his legal advice has been sought with full knowledge of his union activities. However, we believe that "full disclosure" requires an attorney to call the possible problem of impaired judgment—not simply the underlying facts—to the attention of his or her client, insofar as such possibility is reasonably forseeable. In the present case, because the Center Counsel is the only source of legal advice available to the "client" who is not arguably touched by the union membership problem, any required disclosure should be made to the Center Counsel, as well as to any specific person at the Center who requests pertinent legal advice directly from the inquirer. Assuming that adequate disclosure has been made, we believe that in the absence of any objection raised by the inquirer's employer, the inquirer is free to give the legal advice at issue.

Inquiry No. 79-4-12
May 29, 1979

Opinion No. 69

DR 2-105—Designation of Area of Specialization or Concentration in Directory of Law School Graduates

The alumni association of a law school proposes to publish a directory of the law school's graduates. The directory will be made available to the law school alumni at a reasonable cost, but neither the alumni association nor the law school will make any significant profit from such sales. It is proposed as part of the directory either to designate the area of specialization that each attorney engages in or to permit the attorney listed therein to designate his or her areas of concentration.

We are asked whether the designation of an attorney's area of specialization or concentration would violate any of the rules or regulations of the Code of Professional Responsibility as applicable to the District of Columbia.

The relevant canon covering this inquiry is Canon 2, which obligates a lawyer to assist the legal profession in fulfilling its duty to make legal counsel available. This canon deals primarily with the ethical considerations pertinent to the lawyer's relationship to the lay public and, in part, to the role the lawyer plays to assure the public recognizes legal problems and can select a lawyer on an informed basis. The keynote of this relationship is the mandate that a lawyer make no representation concerning himself or herself, or his or her partners or associates, that is false, fraudulent, misleading, deceptive, or self-laudatory. Although the inquirer indicates that the directory will be sold or distributed only to law school graduates, and therefore, presumably to lawyers, we cannot assume that the directory will not become available to members of the lay public and be utilized by them in selecting a lawyer. Notwithstanding that a lawyer may be less susceptible to being misled by another lawyer's self-praise or claims of expertise, we shall treat the inquiry on the basis that the directory may become available and be utilized by lay persons and that the ethical considerations applicable to lay person govern its content.

The most pertinent of the disciplinary rules, as adopted for the District of Columbia, is:

DR 2-105. LIMITATION OF PRACTICE

(A) A lawyer shall not hold himself or herself out publicly as, or imply that he or she is, a recognized or certified specialist, except as follows:
  (1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his or her letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," Trademark Attorney," or "Trademark Lawyer," or any combination of those terms, on his or her letterhead and office sign, and a lawmay use the designation of "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his or her letterhead and office sign.

(B) A statement, announcement, or holding out as limiting practice to a particular area or field of law does not constitute a violation of DR 2-105(A) if the statement, announcement, or holding out does not include a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C).

The cited disciplinary rule thus prohibits a lawyer from holding himself or herself out, publicly or by implication, that he or she is a recognized or certified specialist in any field other than patents, trademarks, or admiralty law. However, a lawyer may hold himself or herself out as limiting his or her practice to one or more particular areas or fields of law such as tax, immigration, or practice before a particular administrative agency, etc.

It is equally permissible for a lawyer to state the areas of law in which he or she or his or her firm normally engage, such as "general practice," "probate," "litigation," "administrative law," and the like, so long as he or she does not imply that he or she is a recognized specialist in those areas. Such descriptions of the practice of a lawyer are expressly sanctioned by published ethical considerations of the Canons (see EC 2-8, EC 2-14) and have long been accepted as ethical public communications in law lists or other media. (See e.g., the biographical sections of Martindale-Hubbell Law Directory.) Since the Supreme Court's decision in Bates v. State Bar of Arizona, 433 U.S. 350, there can be little doubt that such self descriptions in directories or in other advertising media may not be proscribed by state imposed rules of conduct, so long as they are not false, misleading, or deceptive.

Accordingly, we conclude that the law school directory may permit each graduate to state the areas of law in which he or she practices or the particular area or field of law to which his or her practice is limited, but he or she may not hold himself or herself out in the District of Columbia to be a recognized or certified specialist in any area of law other than patents, trademarks, or admiralty.

Inquiry No. 79-3-6
May 29, 1979

Opinion No. 70

DR 2-103(C); DR 2-105(A); EC 2-14—Propriety of Lawyer Participation in Private Advertising and Referral Service

An attorney requests the opinion of this Committee on the propriety of cooperation by members of the District of Columbia Bar in an organization that holds itself out as an "independent advertising service."

The organization places advertising, in its own name, designed to elicit contacts by lay persons seeking referral to an attorney qualified to handle their particular legal problems. The staff of the organization screens the calls and refers the callers, on a rotating basis, to the next attorney on one of a number of panels that it maintains, which it calls "specialty panels."

The specialty panels are composed of lawyers who have paid a stated fee to the organization for that week and have specified the particular area of the law as one in which they are willing to provide advice and representation. The participating lawyers agree not to charge more than $15 for an initial half hour consultation with clients generated by the advertising service. There are no restrictions on fees for additional work. Those fees are to be set by agreement with the client. Attorneys may participate only if they also participate in the Lawyer Referral and Information Service of the District of Columbia Bar.

The inquiring attorney expresses a personal view in opposition to the private advertising and referral service, stating that it "can destroy the credibility of official bar association lawyer referral services" and that any lawyer able to pay the required fee "can designate himself or herself as a specialist and advertise anonymously as a specialist."

Insofar as anonymity is concerned, our Opinion No. 53 (Oct 31, 1978) stated that failure of lawyers to identify themselves by name in advertisements for legal services does not violate the Code of Professional Responsibility. That is true whether the lawyers place the advertisements personally or, as here, through an intermediary.

One provision of the Code, however, does appear to be squarely applicable. It is DR 2-103(C), which provides:

"A lawyer shall not compensate or give anything of value to a person or organization to

recommend or secure his or her employment by a client...except that he or she may pay for public communications permitted by DR 2-101 ["Publicity and Advertising"] and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored or approved by a bar association."

The organization involved in this inquiry functions as a typical lawyer referral service, receiving calls from members of the public and referring the callers to particular attorneys who have paid a fee and indicated their willingness to accept referrals of certain types of cases. The service is private, not "operated" or "sponsored" by a bar association. Hence, DR 2-103(C) permits lawyers to pay its charges only if it is "approved" by a bar association. There is no evidence in the materials submitted with the inquiry that the private referral service has received bar association approval.

DR 2-103(C) requires such approval. We assume that this requirement is intended to furnish the public with some assurance that the organization making referrals is responsible, and its service useful, though there is no indication in the Code of the criteria on which approval is to be based.

The approval of the D.C. Bar would fulfill the requirement of DR 2-103(C). However, the approval of any bar association, no matter how small or non-representative of the bar generally, appears to be sufficient for Code compliance.[1]

Because of the language of DR 2-103(C), we believe that the organization involved in this inquiry must obtain approval of its referral service by some bar association before attorneys can pay its fees or otherwise cooperate with it, consistent with their obligations under the Code of Professional Responsibility.[2]

A final source of possible conflict with the Code is found in the use by the organization of the term "specialty panels." DR 2-105 (A) states that, except in the fields of patent, trademark and admiralty law:

"A lawyer shall not hold himself or herself out publicly as, or imply that he or she is, a recognized or certified specialist...."

EC 2-14 states:

"In some instances a lawyer confines his or her practice to a particular field of law. In the absence of local controls to insure the existence of special competence, a lawyer should not be permitted to hold himself or herself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate if it is factual, a limitation of his or her practice or that the lawyer practices in one or more particular areas or fields of law in public announcements which will assist laypersons in selecting counsel and accurately describe the limited area in which the lawyer practices."

The Committee has been unable to discern from these sections of the Code, with any degree of certainty, the intention of the Court of Appeals as to the use of the term "specialist" and derivatives thereof such as "specialty" panels. For instance, DR 2-105(A) prohibits only a holding out as a "recognized or certified specialist," whereas EC 2-14 disapproves also a simple holding out as a "specialist"—without the limiting words "recognized or certified."

Prior to the 1978 revision of the Code by the Court of Appeals, DR 2-105(A) read:

"A lawyer shall not hold himself out publicly as a specialist or as limiting his practice...."

The addition of the limiting adjectives "recognized or certified" before the word "specialist" seems to have been deliberate and should be given some effect. EC 2-14 aside, the modification of DR 2-105(A) would appear to be judicial recognition of the fact that lawyers do, increasingly, specialize by concentrating their practices in certain areas where they develop special expertise about which it is useful for the public to know. The change of language of DR 2-105(A), read alone, limits the proscription on publicizing a specialty to claiming official recognition or certification as a specialist. There is, of course, no procedure for certification in the District of Columbia.

This reading is also supported by the addition of the last sentence of EC 2-14, in the 1978 Code revision, permitting lawyers to publicize the fact that they practice "in one or more particular areas or fields of law." The addition of EC 2-14 recognizes such publicity as a means to "assist laypersons in selecting counsel."

It is inexplicable, therefore, that the first two sentences of EC 2-14 were changed hardly at all, and still read as an unqualified disapproval of a lawyer holding himself or herself out as a "specialist." The Committee must regard as an oversight the failure to qualify "specialist" in EC 2-14 with the adjectives "recognized or certified," as it is qualified in DR 2-105(A). In any event, only the Disciplinary Rules are "mandatory in character" and so EC 2-14 may not be viewed as enlarging the proscription of DR 2-105 (A). See the Preliminary Statement to the Code of Professional Responsibility as to the difference between Disciplinary Rules and Ethical Considerations.

The Committee concludes, therefore, that participation by lawyers in an approved referral service that advertises "specialty" panels is not prohibited by the Code so long as there is no implication in the advertisements that the lawyers have been offficially recognized or certified in their specialty. However, a lawyer does have an overriding ethical obligation not to make "any representation about his or her ability, background, or experience" that is "misleading" or "deceptive." See DR 2-101(A). Permitting one's name to appear on a panel held out to the public as a "specialty" panel does convey to the public that the lawyer has some special competence in that area of the law, or at least that he or she devotes a substantial portion of his or her practice to that legal area. If that is not true, the lawyer so listing would be in conflict with DR 2-101(A).

It is arguable that DR 2-105(A) and EC 2-14 permit the use of the term "specialist" and derivatives thereof only to refer to fields of law to which lawyer *limit* their practice. DR 2-105 is headed "Limitation of Practice." Subsection (B) of DR 2-105 deals expressly with statements "holding out as limiting practice to a particular area or field of law." EC 2-14 begins with a reference to instances in which a lawyer "confines his or her practice to a particular field of law," and ends with a requirement that announcements "accurately describe the limited area in which the lawyer practices."

However, DR 2-105 does not expressly state that the term "specialist" may be used only by a lawyer who limits his or her practice to that particular specialty. We do not feel that we can read such a limitation into the Code when it is not expressly stated. EC 2-14 expressly permits factual representations by a lawyer of "a limitation of his or her practice *or* that the lawyer practices in one or more particular areas or fields of law" (emphasis added). We think it sufficient, therefore, that the lawyer devote a substantial portion of his or her practice to the legal area in which "specialty" is claimed, or that he or she is otherwise able in good faith to claim special competence in that area. With these guidelines in mind, we find nothing objectionable under the Code in a lawyer cooperating with a bar-association-approved advertising and referral service that lists participating attorneys in "specialty" panels.

Inquiry No. 79-1-1
May 29, 1979

Opinion No. 70A

DR 2-103(C)—Propriety of Lawyer Participation in Private Advertising and Referral Service Where No Mechanism for Bar Approval of Such Service Has Been Established; Application of Opinion No. 70 in Such Circumstances

An inquiry has been made concerning the application of DR 2-103(C), as interpreted in Opinion 70, to a lawyer referral service that has sought from the District of Columbia Bar the approval contemplated in DR

[1] Prior to the 1978 revision by the D.C. Court of Appeals of the Code under Canon 2, it required approval by a bar association "representative of the general bar of the geographical area in which the association exists." See prior DR 2-103(D)(3). The limiting language was removed in the 1978 Code revision. We have no reason to suppose that the removal was intended to give operative effect to approvals by other than bona fide bar associations.

[2] We do not think the fact that the organization limites participation in its service to lawyers who also participate in the Referral Service of the D.C. Bar means that it will necessarily obtain bar association approval. However, that ought at least to eliminate any concern about the maintenance of adequate standards of lawyer participation.

2-103(C) and whose application has not been acted upon because the Bar has established no mechanism for acting upon such applications. The inquiring lawyer referral service represents that all of its participating attorneys are required to participate in the District of Columbia Bar's Lawyer Referral and Information Service and are members of the corresponding panels of that service.

It would be contrary to the purposes of DR 2-103(C) to prohibit attorneys from participating in such services in these circumstances. It is, therefore, the opinion of the Legal Ethics Committee that, until such time as the District of Columbia Bar creates a mechanism for acting on referral service applications and approves or disapproves the application of a lawyer referral service, it is permissible for an attorney to participate in such a service, notwithstanding its lack of approval by the District of Columbia Bar. This opinion is applicable only to referral services which have applied to the District of Columbia Bar for approval, and the referral service's requirements for lawyer participation in its advertising and referral program must correspond to the requirements imposed on lawyers as a condition of participation in the Bar's Lawyer Referral and Information Service.

Opinion No. 71

DR 4-101(B), (C); DR 5-105; Canon 9— Newly-Employed Government Laywer's Participation in Rulemaking Involving Former Client and Law Firm

A lawyer was an associate in a law firm one of whose specialities is the representation of companies engaged in a certain line of business. Beside these companies themselves, the law firm represents and represented during the lawyer's tenure as an associate a trade association of such companies. The lawyer has now gone to work for a government agency that recently issued new rules governing the activities of companies such as those that the lawyer's former law firm represents. He intends to work in the branch of the agency that is concerned with interpretation and enforcement of the new rules, among other things. The agency hired him with the expectation that he would work in that branch and with full knowledge of his background.

The lawyer personally assisted in the preparation of the comments that his law firm's trade association client submitted in the proceeding that led to the promulgation of the new rules. By and large the association favors the rules. Since the lawyer went to work for the agency, it has published proposed guidelines for compliance with the new rules and invited comments on them. The trade association, represented by the lawyer's former law firm, has submitted comments on the proposed guidelines. So have some of the association's members.

The lawyer has asked a series of questions about possible ethical restrictions on the assignments he may undertake in his new government job. The foregoing statement of the facts and the additional recitals of the facts that appear below are partial distillations of an elaborate and admirably detailed inquiry that the lawyer has submitted. We deal here with only the most immediate of the questions he has raised. Those pertain to his participation in drafting, on the basis of the agency's proposed guidelines and the comments thereon, the final compliance guidelines. Other, less urgent questions will be treated in a separate opinion.

We believe that the lawyer is free, in the circumstances he describes, to participate in drafting the guidelines. In giving this answer we assume as we did in Opinion No. 63 that, although DR 5-105 (with whose inept phrasing we had to wrestle in Opinion No. 49) on its face squarely addresses only simultaneous dual representations, it imposes restrictions on matters a lawyer may handle that relate to a former client even when no disclosure of the former client's confidences, forbidden by DR 4-101(B), is threatened. We also assume that, although the disciplinary rules under Canon 9 do not at this writing deal explicitly with the case of the lawyer entering public service from private practice, there may nevertheless be ethical inhibitions, arising from the concern of Canon 9 for avoiding the appearance of impropriety, on the assignments a lawyer entering public service may undertake because of the relationship of the assignments to his former practice. Cf. Opinion No. 48.

These are the considerations that underlie our affirmative answers to the lawyer's questions about whether he may participate in drafting the final guidelines:

1. The inquirer does not say that any of the companies on whose affairs he personally worked while with his former law firm has submitted comments on the proposed guidelines. We therefore assume that none has. The lawyer states that confidences of members of the trade association were not imparted to him, directly or indirectly, in the course of his work for the association. Nothing in the nature of the law firm's representation of the association gives rise to doubts on that score. It was a typical Washington representation, consisting of advising the association and through it the association members on current governmental developments and attempting to advance the interests of the association and its members in proceedings such as the rulemaking proceeding before the agency for which the inquiring lawyer now works. The firm did not give association members individual legal advice unless they were otherwise clients of the firm.

It is certainly possible to find ethics committee and judicial opinions that would suggest a need to cast a wider net, to ask about all of the relevant clients of the firm's—not just those on whose affairs the inquiring lawyer worked—and to ask whether any client imparted relevant confidences to any of the inquiring lawyer's associates while he was associated with them. But we believe that such suggestions need not and should not be followed here, whatever may be true when the facts are different.[1] DR 4-101(B) prohibits "a lawyer" from revealing a confidence or secret of his client or using a confidence or secret to his client's disadvantage. The lawyer who does not possess a confidence or secret cannot reveal it or misuse it. Any implied prophylactic rule against undertaking a representation because of a threat that DR 4-101(B) would be violated should be limited to the case in which there is in fact such a threat. We have considered the prophylactic rule and the judicial authorities that have shaped and applied it in our recent Opinion No. 63. There may of course be cases in which the lawyer's former association was of such a nature that he will not be heard to assert that he did not share in confidences imparted to partners and associates, but we do not believe that the case of our inquirer, an associate in a law firm of fair size at the time he left, is such a case. Therefore, DR 4-101(B) is not a bar to the inquirer's participation in drafting the guidelines.

2. There remains the question whether, apart from any possible breach or abuse of confidence, the lawyer is barred because he once represented the trade association in commenting on the proposed version of the rule for which he now proposes to write the compliance guidelines. The rule that might erect such a barrier presumably is stated in DR 5-105. The lawyer, however, has stated his willingness fully to disclose to his former firm's trade association client what he proposes to do and to ask for its consent to his participation in drafting the final guidelines. We do not decide whether that step is necessary under the Code. We believe that, necessary or not, it obviates any possible question under DR 5-105 (and, according to DR 4-101(C), any problem arising from possible breach of the association's own confidences). The lawyer has already made full disclosure to his new government agency superiors and could not, of course, undertake the assignment except on their direction and therefore with their consent.

Besides informed consent of both clients, DR 5-105(C) requires that, if a representation otherwise forbidden by DR 5-105(A) or (B) is to be undertaken, it be obvious that the lawyer can adequately represent each client. We believe that under the standard established in our Opinion No. 49, it may fairly be regarded as "obvious" within the meaning of DR 5-105(C) that the lawyer can adequately represent the agency in drafting the guidelines. Indeed, as indicated at the

[1] A recent case that seems to cast a wider net than this Committee does, worthy of note becaue it involves a lawyer entering government, is Little Rock School Dist. v. Borden, Inc., 1979—1 CCH Trade Case ¶62,568 (E.D. Ark. April 5, 1979).

outset of this discussion, we have not decided, because it is unnecessary to do so, that the former representation of the association would impair the full exercise of the lawyer's professional judgment or involve him in conflicting loyalties in the first place, especially given the association's general support of the rule that it is now proposed to enforce.[3] (One of the awkward aspects of DR 5-105 if it is taken to apply to nonsimultaneous representations is that in terms DR 5-101(C) requires that it be obvious that the lawyer can adequately represent each client; if one feels obliged to strain to accommodate the language of the rule, it can be said that it is perfectly obvious that the lawyer can adequately represent the trade association client to the extent that he and it expect such representation—which is not at all.)

3. The Board of Governors has proposed to the Court of Appeals under date of February 9, 1979, a series of amendments of Canon 9. One amendment would add to the Canon a disciplinary rule, DR 9-101(F), that would prohibit a lawyer for a year after entering public service from participating in a matter in which a participating party was a client personally in the lawyer's last year of private practice or is represented by the law firm the lawyer was with during his last year of private practice. That is one of the alternative forms of restriction that this Committee served up for the Board of Governors' consideration. A majority of the Committee proposed to the Board as ethically sufficient a different rule. That rule came down to a requirement that a lawyer such as our inquirer, a lawyer not appointed by the President with the advice and consent of the Senate, disclose the former relationship to a superior who was so appointed at the time the relationship affected the assignment. Either version of proposed DR 9-101(F) remains a mere proposal. Neither would conceivably be given retroactive effect. This Committee's version would be satisfied, however broad its sweep, because the lawyer obviously has disclosed the former relationship. But in fact neither version sweeps wide enough to reach our case. Each is limited to participation in a "matter," and "matter" is proposed to be so defined as to exclude the usual making of a rule of general applicability. That is what the formulation of the compliance guideline is. The Board of Governors made the intended limitation of "matter" clear twice over. A definition of "matter" is proposed for inclusion in the Code as part of the February 9 package. There is a catchall provision of the definition, which was "...or other particular matter" in this Committee's version. The Board of Governors added the words "involving a specific party or parties." There may be rulemaking proceedings that involve a specific party or parties and that might qualify as particular matters, but on our inquirer's statement of the case the compliance guidelines proceeding in which he wants to take part is not one. The underlying rule governs the conduct of many companies in a substantial industry; the proposed compliance guidelines themselves drew comments from 92 companies, associations and others. It is inconceivable that this Committee and the Board of Governors would have worked and worried as much as each has over the form and content of proposed DR 9-101(F) if either had believed that there already lurked somewhere in the Code a restriction of even greater sweep. Certainly the outcry that even this Committee's version of DR 9-101(F) evoked from some agency general counsel is inconsistent with the notion that their lawyers were already subject to a rule of disqualification extending to many more possible assignments than our simple disclosure rule.[3]

4. If the prior rulemaking were a "matter" in which the inquiring lawyer participated while in private practice and the formulation of guidelines for complying with the rule that resulted from it were regarded as a continuation of the same "matter," then we would have to consider whether there is already implicit in the Code a rule forbidding a lawyer entering public service from ever participating in a matter in which he participated while in private practice. Such a rule is stated in proposed DR 9-101(C), a rule parallel to the present absolute disqualification of a lawyer leaving public service from participation in any matter in which he participated while in public service. The proposed rule is noncontroversial and has been greeted as stating a norm that already prevails in practice and thus might be thought merely to make explicit what is already implicit in the Code. But for the same reason that the compliance guidelines rulemaking proceeding itself is not properly considered a "matter," the original rulemaking proceeding is not properly so considered either. It was in form and in substance a proceeding of general, not particular, applicability and did not involve specific parties. We need not therefore decide whether, if either or both rulemakings were a matter, they are the same matter.

5. The lawyer, while willing as has been said to ask the trade association for consent to his participation in drafting the guidelines, would much prefer not to have to ask the consent of those members of the association that have separately filed comments on the proposed guidelines. He is apprehensive because of the recent and well-known decision in *Westinghouse Electric Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.); *cert. denied*, 99 S. Ct. 353 (1978). In that case it was held that a law firm, by undertaking a particular representation of a trade association, became lawyer for some members of the association and was therefore disabled from representing another client in a suit against some such members that concerned a subject closely related to the subject of the representation of the trade association. But in that case the association members imparted confidences to the law firm in the apparent belief that it was representing them individually as well as the association. As we have said, the inquiring lawyer's former law firm's representation of its trade association client has not been of that sort. In the inquiring lawyer's experience, as we have also noted, the representation did not involve the law firm in the business affairs of the association members, and no confidences were imparted. We think that the lawyer need not regard the members of his former trade association client as his clients in considering whether he must disqualify himself or should ask consent to participate in drafting the final compliance guidelines.

Inquiry No. 79-5-13
June 26, 1979

Opinion No. 72

DR 4-101; EC 4-3—Attorney's Disclosure to Realty Title Insurance Company, for Purposes of Audit, of Information Which May Constitute "Confidences" or "Secrets" of his Client

We have been asked to advise whether inspections by auditors, employed by a District of Columbia realty title insurance company, of attorneys' files with respect to real estate settlements may violate the attorney-client privilege or the D.C. Code of Professional Responsibility. The inspections are for purposes of spot-checking real estate transactions to determine whether the requirements of lenders and the contractual obligations of parties have been met and the proper distribution of escrow funds has been made.

The realty title insurance company has licensed agents, D.C. attorneys, who are authorized to issue title insurance binders. The company also maintains a list of approved attorneys who are eligible to submit to the company or to a licensed agent of the company a report of title. This report serves

[3]Since the rendition of Opinion No. 49, DR 5-105(A) and (B) have been amended to prohibit dual representation not only where the exercise of a lawyer's independent professional judgment is likely to be impaired but also where it "would be likely to involve him in representing differing interests...." As pointed out in Opinion No. 49, footnote, "differing interests" as defined in the Code adds to the grounds for proscription of a representation only the concept of loyalty to a client.

[3]Another proposal for amendment of Canon 9 contained in the package submitted to the Court on February 9 buttresses the conclusion stated in the text. Proposed DR 9-101(E) would impose restrictions on what a former government employee could do respecting a rule of general applicability that he had drafted or decided to propose or adopt, but the extent of the restrictions and even whether there should be any are highly controversial issues. No similar rule is even proposed for the lawyer entering government.

as the basis for issuance by the company of a title insurance binder. Both classes of attorneys act as independent contractors in their dealings with the company. These title insurance binders reflect the status of the title to lenders and prospective purchasers, state requirements which must be complied with prior to closing and state permanent exceptions that will appear in the final title insurance policy. The company issues a "standing" closing letter to the lender under which it assumes a contractual liability to the lenders to ensure that these attorneys will satisfy all the settlement requirements and properly disburse all funds with respect to the obligations reflected in the title insurance binders.

The conventional wisdom in this situation is that the attorney represents the buyer. Although the attorney-client relationship seems somewhat attenuated here, nevertheless buyers may impart confidences to, and secrets may be acquired by, such attorneys, who must hold such information in confidence.

It is the company's intention to use its auditors to inspect these attorneys' files to ascertain the following: that the amount of charges made by the company for the insurance is proper; that there are no improper referral fees paid to anyone out of the insurance premiums collected; that disbursements to release existing trusts have been made; that the obligations of the seller have been paid; that disbursements to the seller of his net proceeds have been made; that each paid and cancelled note of a prior obligation has been received and released of record; and that disbursements and the attorneys' financial procedures in handling these trust funds have been proper.

DR 4-101 states in part:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:
(1) Reveal a confidence or secret of his client.

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(C) A lawyer may reveal:
(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

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We have been advised that in practically all cases the information sought to be reviewed by the company is information which either is a matter of public record or has been disclosed to persons other than the attorney and the client, including the lender, the other party to the real estate transaction, the title insurance company, or the government agency concerned with regulating or collecting information regarding real estate transactions. This information, having been disclosed to persons other than the attorney and client, is no longer privileged, it can no longer be deemed a "confidence," and is not likely to be a "secret."

It is our conclusion that it is unnecessary for an attorney to obtain the client's consent before disclosing the above-described information to the company's auditor. However, where particular information, which in the attorney's opinion is needed by the company properly to perform its audit, may constitute a "confidence" or "secret" of the client, it is the attorney's obligation to obtain from the client, after full disclosure to him, a consent to disclosure of such information to the company. Further, it is the attorney's obligation to remove from the file prior to its inspection by the company any information constituting a "confidence" or "secret" of the client for which a consent to disclose has not been obtained. DR 4-101.

It may be suggested that information needed by the company's auditor but which remains a "confidence" or "secret" of the client may, nevertheless, be disclosed without the client's consent by reason of EC 4-3 which reads as follows:

> Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

We do not believe that EC 4-3 obviates the need to obtain the client's consent after full disclosure prior to disclosure of any "confidences" and "secrets" contained in his file in the situation before us. The information that would be disclosed here would clearly relate to a specific client and be identifiable as such. Further, the purpose of such disclosure seems to fall outside the scope of the purposes listed in EC 4-3, which appear to be directed to agencies which supply various services to law firms.

Inquiry No. 78-5-12
July 31, 1979

Opinion No. 73

DR 7-110(B)—Ex Parte Communications in Equal Employment Opportunity Commission and District of Columbia Office of Human Rights Proceedings

We have been asked whether it is ethical for an attorney representing a party in connection with an investigation or proceeding before the District of Columbia Office of Human Rights (DCOHR) or the Equal Employment Opportunity Commission (EEOC) to have *ex parte* communications with (a) the "investigator" for the agency, (b) the "conciliator" for the agency or (c) the "hearing examiner" for the agency.

The complaint review process at the EEOC is set forth at 29 C.F.R. §1600 *et seq.* which is supplemented by the EEOC Compliance Manual. Upon receipt of a complaint,[1] an investigator reviews the information submitted by the parties and any other documents he deems relevant, interviews witnesses and recommends to the Commission or its delegate, *e.g.*, the District Director, whether "reasonable cause" exists to believe that Title VII has been violated. The Commission renders a decision on "reasonable cause."

If the Commission determines that "reasonable cause" exists, it attempts to conciliate between the parties, holding a conference attended by the respondent and a conciliator and sometimes by the complainant and his or her attorney.[2] If conciliation fails, a decision is made as to whether suit is warranted. No final administrative determination on the merits of the complaint is made by the agency. Material in the EEOC's files is available, under certain conditions, to the complainant if he or she is contemplating litigation or if litigation is pending. It is available to the respondent only if the complainant has brought suit. EEOC Compliance Manual §83.

The complaint review process at the DCOHR is set forth at D.C. Code §6-2281 *et seq.*, supplemented by regulations in Title 8 of the D.C. Register.[3] The complaint is referred to an investigator who obtains and reviews documentary evidence and interviews witnesses. The investigator summarizes the facts and submits to a supervisor a written summary of the facts and a recommendation for a determination whether there is probable cause to believe that the charge is meritorious. The supervisor recommends to the Director of DCOHR whether a probable cause determination is warranted. The Director either issues a finding of probable cause or a finding of no probable cause.

At any time after the filing of a complaint —but usually after a probable cause determination has been made—the DCOHR may attempt to conciliate by "conference, conciliation or persuasion." Usually, there is a conciliation conference attended by the conciliator, the respondent's representative and the complainant and/or the complainant's attorney.

If a probable cause determination has issued and if conciliation has failed, the case

[1] The EEOC defers processing of complaints to certain state and local agencies with authority to investigate discrimination complaints; the DCOHR is such an agency. Therefore, most discrimination complaints in the District of Columbia are investigated, in the first instance, by DCOHR.

[2] At the Commission's discretion, a pre-investigation conciliation attempt may also be made.

[3] For the purpose of this opinion, the description of the procedures of DCOHR contained in the statute and regulations has been supplemented by a description provided by DCOHR's General Counsel.

is set for hearing. At that point, the investigative file is open to both parties. A hearing is held before one or more members of the Commission, or more often, a hearing examiner appointed by the Commission. The hearing is conducted by a member of the General Counsel's office of the DCOHR. The hearing examiner hears the evidence and reports to the Commission, which thereafter renders a decision. There are no published rules for the conduct of hearings other than the District of Columbia Administrative Procedure Act, D.C. Code §1-1502 *et seq.* and the regulations at Title 8 of the D.C. Register, neither of which regulate *ex parte* communications.

In the procedures of both agencies there are ample opportunities for *ex parte* communications between the investigators and attorneys for the complainant or the respondent.[4] The inquirer asserts that such *ex parte* communications on matters of substance are common. Although the General Counsel of the DCOHR has stated that its investigators are instructed not to have informal communications with counsel except on matters of scheduling and to require all communications to be in writing, neither DCOHR nor EEOC has rules or regulations that prohibit *ex parte* communications or require notification of the opposing party when oral or written information is submitted.

The General Counsel of DCOHR also reports that hearing examiners are also instructed to refrain from *ex parte* communications except on ministerial matters. No regulation prohibiting such contact exists, however, and the inquirer asserts that *ex parte* communications with hearing examiners occur. Neither agency has a prohibition of *ex parte* contact with conciliators and the EEOC's procedures encourage meetings between the conciliator and the respondent's representative without the complainant's presence.

The relevant Disciplinary Rule is DR 7-110(B) which states:

> (B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
> (1) In the course of official proceedings in the case.
> (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
> (3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
> (4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

The applicable Ethical Consideration, EC 7-35, further states:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

These provisions prohibit *ex parte* communications in an adversary proceeding. They do not apply to an attorney's communications with an agency conciliator, whose only task is to attempt to find a meeting ground for the two parties without regard to the merits of the dispute between them. The conciliator performs an administrative function, not an adjudicative or fact-finding function, and, thus, is not covered by the provisions noted above.

These provisions do not apply to *ex parte* communications with a DCOHR hearing examiner. Within the context of the above-described administrative procedures, a DCOHR hearing is an "adversary proceeding" and a hearing examiner is an "official before whom [a] proceeding is pending." Thus, *ex parte* communications with the hearing examiner on the merits—without regard to the importance or magnitude of the communication—are prohibited. All communications with a hearing examiner must be made in conformity with DR 7-110(B)(2) and (3), except as otherwise authorized pursuant to DR 7-110(B)(4).

The application of the provisions of DR 7-110(B) to communications between attorneys and investigators is less clear. By statute, the investigator is charged with collecting data, interviewing witnesses and preparing factual summaries. These duties are not adjudicatory and are aided by access to persons and documents unhampered by adjudicatory procedural requirements. Probable cause determinations are not considered to be "orders" or "final determinations." *See, e.g., Georater Corp.* v. *EEOC*, 19 F.E.P. 70 (4th Cir. 1979).

By its literal terms, the Code of Professional Responsibility does not prohibit *ex parte* communications in other than "adversary proceedings." Because investigators are not adjudicators and their recommendations on probable cause, even if accepted, do not result in final determinations on the merits of complaints, *ex parte* communications with investigators are not barred by the Code.

Because the result in the vast majority of EEOC and DCOHR cases depends upon whether or not there has been a finding of probable cause, however, that decision can assume, on a practical level, the character of a determination of rights. Moreover, the process itself can be in many respects an adversary one, with attorneys vying for the ear of the investigator.

Ethical Consideration 7-35 suggests that lawyers should conduct themselves in such proceedings so as to ensure that the relevant facts and arguments are aired openly. Members of the Bar would be aided in this effort if the agencies themselves—in recognition of the fact that the determinations made by the investigators affect important rights of both complainants and respondents—adopted rules or regulations that instruct investigators to refrain from substantive *ex parte* communications with attorneys, or to record the contacts that do occur, or to provide opposing counsel with notice and an opportunity to respond.

Opinion No. 74

DR 2-101, DR 2-103, DR 2-104—Advertising of Free Consultation With Respect to Whether Apartment Landlords May Be Entitled to a Rent Increase Under Applicable Law

We are asked about the ethical propriety of a newspaper advertisement whose text is as follows:

> LANDLORDS, PROPERTY MANAGERS AND BANK TRUST DEPARTMENTS.
>
> ARE YOUR D.C. APARTMENT RENTS TOO LOW?
>
> You may be entitled to a rent increase under D.C. law. Call [name] at [number] and ask to speak with one of our attorneys for free legal consultation.

It does not appear, from the text of the ad, just what the nature of the organization placing the ad is, but the inquirer advises us that a telephone call to the number listed disclosed that it is a law firm. We are not informed as to what the purpose of the ad is, or to what in fact occurs during or following the "free consultations" offered by the ad; but it appears to be a reasonable surmise that the initial consultations lead, in some cases at least—indeed, they are no doubt intended to lead—to the retention of the law firm for further advice or representation, on a fee payment basis, by landlords and others seeking increases in rents.

On the basis of the limited facts presented to us by the inquiry, we do not perceive in the ad any violation of the Code of Profes-

[4]For example, complainant's counsel may supply oral and written information in support of the complaint, may present arguments to the investigator and may accompany his client to the interview by the investigator. Similarly, respondent's counsel may respond to data requests and offer additional facts and arguments and may accompany his client's employees to interviews by the investigator.

sional Responsibility. The Code provisions potentially applicable to the general circumstances suggested by this inquiry are DR 2-101, on "Publicity and Advertising"; DR 2-103, on "Solicitation of Professional Employment"; and DR 2-104, on "Suggestion of Need of Legal Services." For reasons to be explained, however, it does not appear that any of these Disciplinary Rules is transgressed by the ad in question.

DR 2-101(A) as it has been in effect in the District of Columbia since July 1978 prohibits representations by lawyers that are false, fraudulent, misleading or deceptive; and DR 2-101(B) sets out specific factual circumstances where a statement may be false, fraudulent, misleading or deceptive. The ad that prompts the instant inquiry would be deceptive if the assertion that "you may be entitled to a rent increase under D.C. law" were inherently false; but this is clearly not the case, since there are a number of circumstances in which a landlord may be entitled to a rent increase under that law. The representation made in the ad, that the consultations offered are free, could also be deceptive if the consultations actually conducted were not free; but we are given no reason to think that this is in fact the case in the matter before us. DR 2-101(C) contains specific prohibitions on advertising ("public communication") that contains statistical data, testimonials and endorsements, or statements of opinion about the quality of the services offered, and condemns the use of showmanship and self-laudation—none of which, facially, has any application to the ad here in question. The final paragraph of DR 2-101, paragraph (D), prohibits the payment by lawyers of compensation to representatives of the media for professional publicity in news items, and paid advertisements by lawyers that are not identified or readily recognizable as such. Again neither of these prohibitions has any application here: the ad in question is not a news item but, unmistakably, a paid advertisement.

From its catchline, "Solicitation of Professional Employment," it might be assumed that DR 2-103 could have some application to an advertisement like the one before us. The various subparts of that disciplinary rule do in fact expand in various ways the prohibitions of false and misleading representations contained in DR 2-101 in certain situations that could include or result from the use of advertising, but the inquiry does not suggest that any of them are presented here. DR 2-103(A)(2) prohibits the use, in in-person contacts with potential clients, of undue influence; and DR 2-103 (A)(3) prohibits contacts with potential clients whose mental or physical condition is such as to render them especially susceptible to such influence. We are given no reason to believe that such improper solicitation is involved in the consultations that result from the ad here in question. DR 2-103(B) in substance prohibits lawyers from assisting certain organizaitons in promoting the lawyer's services by means that the lawyers could not themselves employ. There is no suggestion that such an organizational arrangement, or such means of promotion, are involved here. DR 2-103(C) puts limitations on a lawyer paying compensation for recommendations of his services by others, and DR 2-103(D) prohibits a lawyer's acceptance of employment when the employment resulted from a violation of the Code. Neither of these has any apparent potential application here.

DR 2-104, regarding the "Suggestion of Need of Legal Services," deals with the basic circumstances of a lawyer who has given unsolicited advice to a layperson that he or she should obtain counsel or take legal action and who subsequently accepts employment resulting from that advice. Clearly the ad here in question offers unsolicited advice, and it may be presumed that the law firm placing the ad anticipates that its employment will result, in some instances at least, from the potential client taking that advice. However, DR 2-104 prohibits the lawyer accepting employment only in specified, and limited, circumstances: namely, if the advice embodies or implies a statement or claim that is false, fraudulent, misleading or deceptive within the meaning of DR 2-101 (B), or violates the regulations contained in DR 2-101(C)—neither of which, as indicated above, appears to be the case here; or if there was involved coercion, duress, compulsion, intimidation, and the like—as to which, again, there is no suggestion here.

Thus, although we necessarily cannot, on the facts presented to us, exclude the possibility that some unethical conduct lies down the road which the ad under consideration invites its readers to follow, it seems clear that the ad itself falls afoul of no prohibition in the Code of Professional Responsibility.

Inquiry No. 79-4-9
July 17, 1979

Opinion No. 75

DR 2-101, DR 2-106—The Use of Credit Cards and Finance Charges

The inquirer asks whether a law firm practicing in the District of Columbia may accept credit cards to pay for legal services and whether it may charge interest on balances due after a certain period of time.

As we stated in Opinion 23, attorneys may accept credit cards in payment for legal services. This Committee's approval of the use of credit cards in Opinion 23 was subject to various restrictions in Canon 2 relating to attorney advertising which has since been changed to eliminate the restrictions. The Committee's approval was also—and continues to be—contingent upon the following additional constraints which are generally adopted from ABA Formal Opinion 338:

1. The lawyer may not, because of his use of credit cards, increase his fee for legal services rendered to the client.
2. Charges made by lawyers shall be only for services rendered or for funds actually paid on behalf of the client.
3. In participating in a credit card program, the attorney shall scrupulously observe his obligation to preserve the confidences and secrets of his client.

As we stated in Opinions 11 and 60, finance charges or charges for interest on unpaid balances are permissible if they were clearly agreed to by the client in advance of the representation or in advance of a new stage of representation or, where the representation has been terminated, if the client receives some consideration, *e.g.*, forbearance from collection efforts, in return for his agreement to pay interest on arrearages.

In the circumstances outlined, the Committee does not find the use of credit cards or the charging of interest to be unethical.

Inquiry 79-5-16
September 1979

Opinion No. 76

DR 2-101(A), (B)(1), (3) & (6); EC 2-8B—Advertising No Fee for Initial Consultation Where Minimum Charge is Made and Forwarded To Lawyer Referral Service

An attorney advises us that some of his colleagues "are accepting lawyer referral service referrals in which there is an obligation to charge $15 for the initial half-hour consultation (with part or all going to the Bar Association), but are advertising in the press as not charging any fee for an initial consultation." The inquiring attorney has considered engaging in the same practice, but has refrained from doing so, apprehensive that such a practice may be "misleading." He asks for our opinion as to the ethical propriety of such conduct.

The applicable disciplinary rules and ethical consideration under Canon 2 leave no doubt but that such a practice is proscribed. DR 2-101(A) precludes a lawyer from knowingly making any "representation...about the fee or any other aspect of a proposed professional engagement, that is false, fraudulent, misleading, or deceptive, or that might reasonably be expected to induce reliance by a member of the public." DR 2-101(B) indicates that "a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which...(1) contains a material misrepresentation of facts;...(3) is intended or is likely to create an unjustified expectation;...or (6) contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive." Finally, EC 2-8B admonishes lawyers that "because fee information frequently may be incomplete and misleading to a lay person, a lawyer should exercise great care to assure that fee information is complete and accurate....It

would be misleading to advertise a set fee for a specific type of case without adhering to the stated fee in charging clients....Not only must commercial publicity be truthful but its accurate meaning must be apparent to the lay person with no legal background."

It is quite plain that the practice of advertising a "free" consultation to members of the public, yet charging a "lawyer referral service" fee which may or may not be reimbursed to a lawyer referral service, is misleading because it misrepresents to the public that the lawyer will charge no fee for an initial consultation when in fact, in some cases, a fee will be charged. Consequently, such advertising runs afoul of both the cited portions of DR 2-101 and EC 2-8B, and is unethical.

Inquiry No. 79-6-18
November 5, 1979

Opinion No. 77

DR 2-108(A), DR 2-107(A)—Employment Contract Requiring Payment of Liquidated Damages If a Departing Attorney Solicits a Law Firm's Clients

Inquiry

The inquirer is a member of a law firm which has drafted an employment contract for associates seeking to work for the firm. The employment contract provides, under Paragraph 5:

"If termination of employment occurs, [Associate] agrees, that if, within three years of termination, he or anyone under his direction or control directly and personally, solicits any of the clients of the firm OTHER THAN BY THE MAILING OF A PRINTED ANNOUNCEMENT CONTEMPLATED BY THE CODE OF PROFESSIONAL RESPONSIBILITY, then [Associate] agrees to pay the firm liquidated damages measured as follows:

(a) the above stated supplementary portion of four thousand dollars ($4,000) for each year of employment; and

(b) the [bonus] amount paid...for each year of employment."

The provision of the contract will be deleted if not approved by the appropriate committee of the Bar of the District of Columbia, and the inquirer is seeking such approval now.

Ruling

The provision of the employment contract, narrowly construed, is not contrary to the Code of Professional Responsibility.

Code Provisions Principally Discussed

DR 2-107—Divison of Fees Among Lawyers.

"(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client."

and DR 2-108—Agreements Restricting the Practice of a Lawyer.

"(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits."

Opinion

This committee has previously held as ethically proscribed the restrictive termination provision of a contract which required the departing attorney to pay 40 percent of his net billings for any work performed on behalf of a client of his former firm, ruling that such a provision "restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement" (DR 2-108(A)) and constitutes an impermissible division of fees among lawyers (DR 2-107(A)). (Opinion 65).

A departing attorney under this agreement is not restricted in the practice of law, for he may advise the firm's clients of his departure by sending a printed announcement card containing all of the information permitted by the Code and may represent them without penalty if they choose to follow. The departing attorney is restricted for three years in soliciting a client from his former firm and agrees to pay a price if he or anyone "under his direction or control directly and personally solicits any client of the firm." The price is not fixed in relation to any fee for a client (DR 2-107(A)) but is set without regard to the amount of the fee earned or whether the client followed the departing attorney. The price sought could be very high.

Narrowly construed, this contract clause is not proscribed by DR 2-108(A) of the Code of Professional Responsibility or by its application in Opinion 65. The departing attorney agrees to pay damages only if he solicits a client of the firm. A self-initiated, active recruitment effort to obtain the law firm's client as one's own would constitute solicitation. We assume that if the client seeks out the departing lawyer, the discussions which follow on the terms and conditions of representation do not constitute solicitation.

The policy considerations tend to allow the contract clause as an ethical matter, unless we take the position that any inhibition on a lawyer's access to clients is a restriction. The prohibition against any restriction on the right of a lawyer to practice arises from the premise that the law is a profession not a business. (See, Opinion 65; Formal Opinion 300 (1961) ABA Committee on Ethics and Professional Responsibility.) With the advent of permissible solicitation and advertising we must recognize that the private law firm is also engaged in a business.

A law firm has a legitimate interest in maintaining its clientele. Indeed, a law firm confident that its clients are not likely to be courted from within may actually encourage closer associate-client contact and render better legal service than a firm which must worry about the intentions and actions of its associates.

The client or clients of the law firm are not restricted from following the departing attorney. They will be able to make this decision without pressure from the departing attorney.

The associate who joins a law firm has no reasonable expectation that he will be able to recruit its clients should he choose to leave. An associate has no inherent right which needs ethical protection to take a client should he leave.

The solicitation by a departing attorney of his firm's clients is different from a general solicitation. The departing attorney knows the client's problems and is able to use confidential information to solicit the client. Furthermore, the solicitation may involve denigrating the attorneys within the law firm or their practices with the unintended effect that a client leaves the firm, does not follow the departing attorney, and goes elsewhere.

For the reasons stated, the Committee does not find any prohibition in the Code with respect to a solicitation limitation in the contract clause.[1]

Opinion No. 78

DR 5-101, 5-102, 5-105; Canons 4, 9—Participation of Lawyers Entering Government In Proceedings Involving Former Clients

This opinion answers the additional questions of the inquiring lawyer in Opinion No. 71, where we affirmatively answered his most immediate question of whether he could participate in drafting rule guidelines. A brief recital of the facts, more fully detailed in that opinion, seems desirable.

The lawyer was an associate in a law firm that represented some companies and a trade association in a certain line of business. The lawyer personally assisted in preparing the trade association's comments for an agency proceeding to promulgate new rules governing activities of companies in this line of business. His law firm did not represent any other party in the rulemaking proceeding. The lawyer now works for the branch of the agency that is to interpret and enforce the new rules.

We decided in Opinion No. 71 that the lawyer could participate in the agency's

[1] As provided in our rules, we express no opinions as to the legality or the enforceability of the provision. (Rule C-5).

drafting of compliance guidelines. We now decide that, subject to the limitations described below, the lawyer may additionally participate for the agency in proceedings on any petitions for review of the new rules, may prepare informal or formal advisory opinions interpreting the rules, and may participate in the agency compliance program. We are guided in this answer, as we were in Opinion No. 71, by the strictures of DR 5-105, Canon 4 and Canon 9.

These are the considerations that underlie our affirmative answers to the lawyer's questions:

1. In his work for the trade association, the lawyer did not become involved in the business affairs of individual companies or become party to any of their confidences. The representation consisted solely of advising the association, and through it the association members, of current governmental developments and of advocating the interests of the association in proceedings before governmental agencies. The firm did not give association members individual legal advice unless they were otherwise clients of the firm. We believe that in such a situation the Code of Professional Responsibility does not require that the lawyer treat the association's individual members as former clients simply because the association is a former client.[1]

2. The lawyer asks whether he may participate in defending against petitions in a court of appeals for review of the new rules. The trade association has not petitioned for review and under the facts presented to us is now time-barred from doing so. In fact, the trade association by and large supports the rules. Furthermore, no other client of the lawyer's former firm has challenged the rules.

The concerns with which DR 5-105 deals are, therefore, not present here. There is no evidence that the lawyer's independent professional judgment in defending the validity of the rules will be adversely affected by his past role in preparing substantive comments about the rules for his trade association client.

The lawyer's former trade association client is no longer concerned with the independence of the lawyer's judgment, because it cannot be harmed if such independence is lacking. Although we have assumed that DR 5-105 can apply to sequential representation,[2] the mandates of DR 5-105 are designed, in the situation here, to protect only the current client—as well, of course, as the integrity of the bar. Thus, DR 5-105(C) does not require that the former client approve of the lawyer's change in position.

The provision of DR 5-105 that a lawyer may not represent "differing interests" reinforces our analysis. "Differing interests" is so defined in the Code that it is largely repetitive of the basic standard of independence of professional judgment; it also includes every interest that "will adversely affect...the loyalty of a lawyer to a client...." See Opinion Nos. 63, 49 note. In the case of our inquiring lawyer, the former trade association client should no longer expect any loyalty, and there is no reason to doubt his loyalty to the agency.

The current Code does not speak with particularity to the case of the lawyer entering government service. The proposed amendments to Canon 9, submitted to the Court of Appeals by the Board of Governors on February 9, 1979, would offer some guidance. It is instructive to note that even under the new provisions, which some have criticized for there strictness, our inquiring lawyer could participate in the review proceedings. Proposed DR 9-101(F) would prohibit a lawyer for a year after entering public service from participating in a matter in which a participating party was a client personally in the lawyer's last year of private practice or is represented by a lawyer who was in the lawyer's firm in the year before he entered government service. As we noted above, however, neither a former client nor the former firm of the inquiring lawyer is seeking review of the rules.

DR 9-101(C) would prohibit a government lawyer from ever participating in a matter in which he or she had participated personally and substantially while in private practice. This proposed rule is noncontroversial and, as we have said, may merely make explicit what is already implied in the Code. *See* Opinion No. 71. As we explained in Opinion No. 71, however, the proposed definition of "matter" excludes the making of a rule of general applicability. Thus, even if a petition seeking review of a rule could be considered a matter, the rulemaking itself is not a matter, and the two cannot be the same matter. Our inquiring lawyer would be free under the new rules, as he is now, to participate in the agency's defense of petitions to review the rule.

The lawyer presents a separate question about a possible barrier to his participation in the review proceedings. The lawyer is concerned that he may be called as a witness. Certain challengers have argued that ex parte contacts invalidate the rule. In the lawyer's representation of his trade association client in respect of the rule, then a proposed rule, he, as well as others, made some contacts with the agency staff outside the record. It is not disputed that such contacts occurred. The inquiring lawyer asserts that the controlling issue is whether the agency decisionmakers reviewed the ex parte comments with the staff, an issue about which he is ignorant. He further states that, in any event, it is very unlikely he will even be called as a witness. In the circumstances it cannot be said that it is obvious that the lawyer will be called as a witness so as to invoke the proscriptions of DR 5-101(B) and 5-102. Moreover, we note that in the usual agency review proceeding evidence is not taken, and any factual submission outside the administrative record would ordinarily be by affidavit. Any "testimony" the lawyer might be called upon to give would quite possibly fall within numbered exception (1) or (2) to DR 5-101(B) (which also apply to DR 5-102(A)).[3] In any event, the affidavit of counsel on many subjects is common in litigation. *See* Garvey, *The Attorney's Affidavit in Litigation Proceedings*, 31 Stan. L. Rev. 191 (1979).

3. The lawyer also asks whether, if asked to do so, he may prepare advisory opinions applying the rules to specific facts in response to requests from clients of his former firm. The lawyer would obtain the informed consent of clients of his former firm before preparing any opinions for them. Without determining whether his consent is necessary, we do believe that it eliminates any possible question of impropriety under DR 5-105 or Canon 4.

4. The lawyer asks finally whether he may participate in enforcing the rules against clients of his former firm. The lawyer indicates that he would ordinarily prefer to obtain the informed consent of the companies, but that to do so would hamper enforcement efforts, at least in some cases. Under the particular facts the inquiring lawyer has recounted, we believe that he may participate in the enforcement program against clients of his former firm. At the outset, however, we recognize that there is strong sense in the profession, which as a general matter and in the absence of a threat of revelation or misuse of client confidences we find hard to tie to any specific provision of the Code, of "misgivings respecting the

[1] *See* Opinion No. 71. *Cf.* Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*; 99 S. Ct. 353 (1978).

[2] *See* Opinion Nos. 63 and 71.

[3] DR 5-101(B)—A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102(A)—If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

wisdom of attorneys accepting representations when former clients are involved," *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motor Corp.*, 518 F.2d 751, 760 (2d Cir. 1975) (Adams, Jr., concurring). For reasons indicated in part 2 of this opinion, we do not perceive a problem under DR 5-105 even though here we are dealing with actual former clients and not merely the lingering effects of the lawyer's representation of the trade association. We find no reason to believe that, in bringing an enforcement action against a former client, the lawyer's exercise of his independent professional judgment on behalf of his present client, the agency, or his loyalty to that client would likely be adversely affected by the prior representation.

We do have a Code-based concern about the possible breach or misuse of confidences that Canon 4 guards against. The inquiring lawyer, in his previous employment, prepared for several clients disclosures to state agencies under state laws concerning the same general subject area as the new federal rules. In this work, the lawyer arguably may have received confidential information. If, at any later date, it becomes apparent that such confidences may be related to the information relevant for the federal enforcement program, the lawyer should immediately recuse himself from enforcement efforts against the company.

The particular facts that lead us to believe that such recusal is not now required are these. First, the inquiring lawyer assures us that it is extremely unlikely he received any such confidential information. In the course of preparation of the disclosure statements, any information remotely relevant to the statutes was disclosed for public scrutiny, thereby losing its confidential character. Second, the requirements of the federal rules are not substantive and do not require particular action. Thus, any confidential information the lawyer may have received is probably irrelevant to federal enforcement action. Third, the federal rules apply only prospectively, so that any confidences the lawyer may have received in the past would not likely relate to matters that may be subject to enforcement action under the rules.

Given these particular facts, we believe that Canon 4 does not require the lawyer to abstain from participating in the enforcement program. The possibility that any confidences will be used against a former client is simply too remote to require a more prophylactic rule. *See* Opinion No. 71.

It is interesting to note that, if the new DR 9-101(F) proposed by the Board of Governors were controlling, the inquiring lawyer would be absolutely prohibited for one year from enforcing the rules against former clients. For that period there would be no factual issues as to whether the nature of a previous client relationship was such as to trigger the inhibitions of Canon 4 (or 5). However, accepting the inquirer's statement of the nature of his prior relationship, we conclude as we do under the present Code's Canon 4.

Inquiry No. 79-5-13
November 20, 1979

Opinion No. 79

DR 7-102(A)(4), (6) and (7); EC 7-26—Limitations on a Lawyer's Participation in the Preparation of a Witness's Testimony

We have been asked to delineate the ethical limitations upon a lawyer's participation in preparing the testimony of witnesses.

The specific inquiry before us arises out of adjudicatory hearings before a federal regulatory agency. The agency's rules of practice provide that direct testimony of witnesses is to be submitted in written form prior to the hearing session at which the testimony is offered; at that session, the witness adopts the testimony and attests that it is true and correct to the best of his or her knowledge and information and then is offered for cross-examination on the testimony thus submitted. The particular questions put by the inquirer are whether it is ethically proper for a lawyer actually to write the testimony the witness will adopt under oath; whether, if so, the lawyer may include in such testimony information that the lawyer has initially secured from sources other than the witness; and whether, after the written direct testimony has been prepared, the lawyer may engage in "practice cross-examination exercises" intended to prepare the witness for questions that may be asked at the hearing.

Although the particular questions posed by the inquiry are appropriate to the procedural background against which they arise, the issues they raise have broader significance. Submission of direct testimony in written form in advance of a hearing at which the witness is subject to questioning about the testimony is a frequent and familiar pattern, but it is by no means the only kind of setting in which lawyers are called upon to assist in the preparation of a witness's testimony. Written testimony is offered in a variety of forms and circumstances; in answers to written interrogatories, for instance; and in all sorts of affidavits. Lawyers are almost invariably involved in the preparation of the former, and frequently in the latter as well. There is also a pattern, somewhat parallel to that of the administrative agency in the present inquiry, to be found in legislative hearings, where witnesses are commonly expected to submit written statements in advance of their appearances before the legislative committees where they then elaborate upon their testimony *viva voce*.[1] Lawyers are frequently involved in the preparation of such legislative statements and testimony also.

In addition, lawyers commonly, and quite properly, prepare witnesses for testimony that is to be given orally in its entirety. In consequence, questions of whether a lawyer may properly suggest the language in which a witness's testimony will be cast, or suggest subjects for inclusion in testimony, do not arise solely in connection with written testimony. For this reason also, the inquirer's questions about "practice cross-examination exercises" is narrower than it needs to be: there may equally well be practice direct examination.

In sum, the ethical issues raised by the inquiry before us apply more broadly than is implied by the particular questions put by the inquirer. In order to present those issues in a more inclusive setting, the questions may usefully be rephrased as follows:

(1) What are the ethical limitations on a lawyer's suggesting the actual language in which a witness's testimony is to be presented, whether in written form or otherwise?

(2) What are the ethical limitations on a lawyer's suggesting that a witness's testimony include information that was not initially furnished to the lawyer by the witness?

(3) What are the ethical limitations on a lawyer's preparing a witness for the presentation of testimony under live examinination, whether direct or cross, and whether by practice questioning or otherwise?

A single prohibitory principle governs the answer to all three of these questions: it is, simply, that a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may—indeed, should—do whatever is feasible to prepare his or her witnesses for examination.

The governing ethical provisions, which are cast in quite general terms, appear to be EC 7-26 and DR 7-102(A)(4), (6) and (7). The Ethical Consideration reads as follows:

> The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

The disciplinary provisions are these:

> DR 7-102. Representing A Client Within The Bounds Of The Law.
>
> (A) In his representation of a client, a lawyer shall not:
>
> (4) Knowingly use perjured testimony or false evidence....
>
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

[1]The principal difference between this pattern and that of the adjudicatory proceeding of the kind giving rise to the instant inquiry is, ordinarily, that neither the written statements nor the oral testimony are under oath. This difference is not necessarily a significant one for ethical purposes, however.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Curiously, there appear to be no decisions of bar ethics committees directly addressing the line of demarcation between permissible and impermissible lawyer participation in the preparation of testimony from the perspective involved in this inquiry, focusing on the lawyer's conduct rather than on the nature of the testimony; and while there is some authority from other sources, it is scant, and not brightly illuminating.[2] In any event, it seems to us clear that the proper focus is indeed on the substance of the witness's testimony which the lawyer has, in one way or another, assisted in shaping; and not on the manner of the lawyer's involvement. In this regard, the pertinent provisions of the Code, quoted above, do not call for an excessively close analysis. They employ the terms "false," "fraudulent" and "perjured," the terms "testimony" and "evidence," and the terms "illegal" and "faudulent," in a manner that suggests, not that fine differences are intended, but that the terms are used casually and interchangeably. We think therefore, that all of these provisions, so far as here pertinent, are to the same effect: that a lawyer may not ethically participate in the preparation of testimony that he or she knows, or ought to know, is false or misleading.

It follows, therefore—to address the first question here raised—that the fact that the particular words in which testimony, whether written or oral, is cast originated with a lawyer rather than the witness whose testimony it is has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading. If the particular words suggested by the lawyer, even though not literally false, are calculated to convey a misleading impression, this would be equally impermissible from the ethical point of view. Herein, indeed, lies the principal hazard (leaving aside outright subornation of perjury) in a lawyer's suggesting particular forms of language to a witness to instead of leaving the witness to articulate his or her thought wholly without prompting: there may be differences in nuance among variant phrasings of the same substantive point, which are so significant as to make one version misleading while another is not. Yet it is obvious that by the same token, choice of words may also improve the clarity and precision of a statement: even subtle changes of shading may as readily improve testimony as impair it. The fact that a lawyer suggests particular language to a witness means only that the lawyer may be affecting the testimony as respects its clarity and accuracy; and not necessarily that the effect is to debase rather than improve the testimony in these respects. It is not, we think, a matter of undue difficulty for a reasonably competent and conscientious lawyer to discern the line of impermissibility, where truth shades into untruth, and to refrain from crossing it.[3]

We note that in the particular circumstances giving rise to this inquiry, there is some built-in assurance against hazards of this kind, to be found in the fact that the testimony will be subject to cross-examination—which, of course, may properly probe the extent of the lawyer's participation in the actual drafting of the direct testimony, including whether language used by the witness originated with the lawyer rather than the witness, what other language was considered but rejected, the nuances involved, and so forth. The risk of distortion, whether intentional or unintentional, is obviously greater where (as will often be the case with affidavits or written answers to interrogatories) the testimony is not going to be subject to cross-examination. Nonetheless, even in that context there should be no undue difficulty for a lawyer in avoiding such distortion.

The second question raised by the inquiry —as to the propriety of a lawyer's suggesting the inclusion in a witness's testimony of information not initially secured from the witness—may, again, arise not only with respect to written testimony but with oral testimony as well. In either case, it appears to us that the governing consideration for ethical purposes is whether the substance of the testimony is something the witness can truthfully and properly testify to. If he or she is willing and (as respects his or her state of knowledge) able honestly so to testify, the fact that the inclusion of a particular point of substance was initially suggested by the lawyer rather than the witness seems to us wholly without significance. There are two principal hazards here. One hazard is the possibility of undue suggestion: that is, the risk that the witness may thoughtlessly adopt testimony offered by the lawyer simply because it is so offered, without considering whether it is testimony that he or she may appropriately give under oath. The other hazard is the possibility of a suggestion or implication in the witness's resulting testimony that the witness is testifying on a particular matter of his own knowledge when this is not in fact the cases.[4] For reasons explained above, these hazards are likely to be somewhat less serious in a case like the one giving rise to the present inquiry, where cross-examination can inquire into the source of the testimony, and test its truth and genuineness, than in the numerous situations where written testimony will probably not be followed by any examination of the witness at all. Even in the latter situation, however, there should be no difficulty, for a reasonably skilled and scrupulous lawyer, in avoiding the hazards in question.

We turn, finally, to the extent of a lawyer's proper participation in preparing a witness for giving live testimony—whether the testimony is only to be under cross-examination, as in the particular circumstances giving rise to the present inquiry, or, as is more usually the case, direct examination as well. Here again it appears to us that the only touchstones are the truth and genuineness of the testimony to be given. The mere fact of a lawyer's having prepared the witness for the presentation of testimony is simply irrelevant: indeed, a lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly. This is so if the witness is also a client; but it is no less so if the witness is merely one who is offered by the lawyer on the client's behalf. *See Hamdi & Ibrahim Mango Co. v. Fire Association of Philadelphia,* 20 F.R.D. 181, 182-83 (S.D.N.Y. 1957):

> [It] could scarcely be suggested that it would be improper for counsel who called the witness to review with him prior to the deposition the testimony to be elicited. It is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony, whether the testimony is to be given on deposition or at trial. Wigmore recognizes "the absolute necessity of such a conference for legitimate purposes" as part of intelligent and thorough preparation for trial. *3 Wigmore on Evidence,* (3d Edition) § 788.
>
> In such a preliminary conference counsel will usually, in more or less general terms, ask the witness the same questions as he expects to put to him on the stand. He will also, particularly in a case involving complicated transactions and numerous documents, review with the witness the pertinent documents, both for the purpose of refreshing the witness' recollection and to familiarize him with those which are expected to be offered in evidence. This sort of preparation is essential to the proper presentation of a case and to avoid surprise.[5]

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[2]The United States Supreme Court has referred to EC 7-26 and DR 7-102 as embodying "the important ethical distinction between discussing testimony and seeking improperly to influence it," Geders v. United States, 425 U.S. 80, 90 n.3 (1976), but the Court did not elaborate on the distinction.

[3]The United States Court of Appeals for the Fourth Circuit has articulated the line of impermissibility (in the context of the sequestration of a defendant during a short recess in the course of a trial) about as clearly as it can be done:

> The danger...is that counsel's advice may significantly shape or alter the giving of further testimony...that will be untrue or a tailored distortion or evasion of the truth.

United States v. Allen, 542 F.2d 630, 633 (4th Cir. 1976), *cert. denied,* 430 U.S. 908 (1977).

[4]*Cf.* Rule 602 of the Federal Rules of Evidence: A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.

[5]The court in Hamdi went on to say:

> There is no doubt that these practices are often abused. The line is not easily drawn between proper review of the facts and refreshment of the recollection of a witness and put-

It matters not at all that the preparation of such testimony takes the form of "practice" examination or cross-examination. What does matter is that whatever the mode of witness preparation chosen, the lawyer does not engage in suppressing, distorting or falsifying the testimony that the witness will give.

Inquiry No. 79-8-27
December 18, 1979

Opinion No. 80

DR 7-104(A)(1)—Communication by Lawyer Representing A Client With Government Officials

We are asked for our opinion on the application of DR 7-104(A)(1) to communications with government officials.[1] DR 7-104 bears the general catchline "Communicating With One of Adverse Interest." DR 7-104(A)(1) provides:

"(A) During the course of his representation of a client a lawyer shall not:
(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

The questions implied by the inquiry, though not specifically posed, appear to be three: first, whether DR 7-104(A)(1) has any application at all to communications directed to government officials; second, if so, what officials are to be deemed governmental "parties" with whom the rule restricts communications; and third, in what circumstances the restrictions come into play.

These questions raise sensitive issues implicating not only the need to protect uncounselled parties from possible overreaching by attorneys for adverse parties, but also the protection of the rights of the public to petition government officials and agencies. Having weighed all of the considerations which seem to us of principal concern, we have concluded that:

(1) DR 7-104(A)(1) was intended to and, as presently written, does apply to communications between lawyers for private parties and government officials;[2]

(2) The officials who are deemed to be governmental "parties with whom communications under the rule are restricted are quite limited, including only those persons who have the power to commit or bind the government with respect to the subject matter question, whether it be the initiation or termination of litigation, execution or approval of a contract, issuance of a license, award of a government grant, or a rulemaking function; and

(3) DR 7-104(A)(1) applies only in circumstances where the word "party" is applicable in a relatively formal sense—that is, where the government agency or official is involved as a named party in litigation, a party in interest in negotiations (and so a prospective party in litigation if negotiations fail), a party to a contract under negotiation, or a party involved in substantive decisions concerning the issuance of licenses, the award of government grants, or rulemaking proceedings. The rule has no application even in such circumstances unless counsel has specifically been given responsibility for representing the governmental party in the matter and the private party's counsel has effectively been notified of that fact.

I.

A number of decisions from other jurisdictions have addressed the first question—whether the rule has any application at all to communications with government officials—albeit in a more cursory than throughtful fashion. In all instances but one, the opinions have recognized on direct communications with government officials.[3]

The "legislative history" of the rule is less illuminating than the "case history." A footnote to the catchline of DR 7-104 quotes from Rule 12 of the Rules of the California State Bar, which states that "a member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel," and then goes on to state: "This rule shall not apply to communications with a public officer, board, committee or body." Cal. Business & Professions Code § 6076 (1962). It seems clear from this reference that the framers considered the possibility that the ABA's rule, like the California rule, should have no application in a governmental context. It is not equally clear, however, what choice the framers made in this regard. There are, at least theoretically, two possible views of their intentions: the first is that they intended that DR 7-104(A)(1) should not apply to any communications with governmental officers or bodies, but thought the matter so obvious that it was unnecessary to have the text of the rule say so explicitly; and the second is that they intended that there should not be in the ABA Code the exception found in California's Code, and so wrote a disciplinary rule without any such exception, and called attention to the California provision in order to point out an alternative path which they had thought it better not to follow. Although the matter is not altogether free from doubt, we think the second of these possibilities is substantially the more likely one.

DR 7-104 as a whole is clearly based on former ABA Canon 9, and the decisions thereunder,[4] and none of these sources contains the slightest hint of a governmental ex-

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(Continued from previous page.)

ting words in the mouth of the witness or ideas in his mind. The line must depend in large measure, as do so many other matters of practice, on the ethics of counsel. *Id.* at 1833.

Although this passage might be read broadly to mean that any suggestion by the attorney of language or ideas to the witness is improper, we think it is more correctly read in the narrower sense of a lawyer's suggesting false testimony. Thus, immediately after the passage in question, the court quoted *3 Wigmore On Evidence* (3d ed.) § 788:

> This right may be abused, and often is; but to prevent the abuse by any definite rule seems impracticable.
>
> It would seem, therefore, that nothing short of an actual fraudulent conference for concoction of testimony could properly be taken notice of; there is no specific rule of behavior capable of being substituted for the proof of such facts.

Hamdi & Ibrahim Mango Co. v. Fire Assn. of Philadelphia, *supra*, 20 F.R.D. at 183.

[1]Because this inquiry was broad in scope, posing no particular question but seeking general guidance in a matter that inevitably is of special concern to a wide segment of this Bar, we deemed the matter to be one requiring an opinion of broad scope. Consequently, in accordance with our rules as approved by the Board of Governors, a draft opinion was published so as to elicit comments from the Bar and from interested members of the public before final action was taken concerning this inquiry. We have received at least twenty formal responses to our request for comments, and these responses, along with extensive discussions within the committee and a recent, thoughtful article by Professor John Leubsdorf, have prompted reconsideration and revision of our tentative draft opinion. See Leubsdorf, *Communicating With Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. Pa. L. R. 683 (1979).

[2]While we acknowledge that DR 7-104(A)(1), as it presently exists, requires consent of government counsel in advance of communications with government officials who are deemed with parties under the circumstances we have described, we believe that proposals should be developed to modify the present rule so as to eliminate any need for such consent and to require instead only that notice of intent to communicate with government officials be given counsel in advance of such communications. See discussion, *infra*.

[3]*See* A.B.A. Informal Opinion 1377 (June 2, 1977); New York State Bar Association Opinion 160 (October 9, 1970); State Bar of New Mexico Advisory Opinion, 9 State Bar of New Mexico Bulletin 391 (1971); Florida State Bar Association Opinion 68-20 (June 7, 1968) (digested at 44 Florida Bar Journal 404 (1970)); Oklahoma Bar Association Opinion 212 (September 15, 1961), 32 Oklahoma Bar Journal 1572 (1961); North Carolina Bar Association Opinion 455 (April 17, 1964), 11 N.C. Bar 14 (May 14, 1964); Alaska Bar Association Opinion 71-1 (April 14, 1971) digested at O. Maru, 1975 Supp., Digest of Bar Association Ethics Opinions 40 (1977) (recognizing applicability of ethical restrictions on direct communications with government officials). *See also*, State Bar of Texas Opinion 233 (June 1959), 18 Baylor Law Review 313-314 (1960) (Committee equally divided on applicability of ethical restrictions to direct communications with government officials).

[4]See footnotes 75, 76 and 77, to DR 7-104(A)(1) and (2), as well as footnote 30 which is appended to EC 7-18, the ethical consideration that illuminates this disciplinary rule.

ception. There is, therefore, neither a textual nor an historical basis for a conjecture that the framers found the California exception implicit in the Rule as they drafted it. If the framers had wanted to include such an exception, the simplest and indeed the only sensible way to do this would have been to add a brief sentence or clause to the disciplinary rule explicitly saying so. Merely quoting Rule 12 in a footnote, without explanation or elaboration, was hardly an effective way to communicate such an intention.[5]

It is more likely, therefore, that the framers' meaning was just the opposite: that they intended *not* to include California's exception in the ABA Code. In this view, the reason for quoting Rule 12 in the footnote was simply to draw attention to a course which the framers considered but rejected. If Rule 12 is thus viewed as a possible alternative to the course taken in DR 7-104, it will be seen that it varies from that provision in *two* substantive respects: not only in having a governmental exception, but in lacking anything comparable to DR 7-104(A)(2), which deals with circumstances where a potentially adverse party is not represented by counsel.[6] It is, in all likelihood, this plural variance of California's Rule 12 from DR 7-104 that furnishes the reason for the otherwise curious placement of the footnote, hanging on the catchline rather than the text, for only this placement offers Rule 12 in meaningful juxtaposition to the the entire disciplinary rule.[7]

What analysis of the text and the history of DR 7-104 thus suggests, consideration of the policies traditionally thought to be the underpinning for the rule, as applied to the circumstances under discussion, tends to confirm—although again no conclusions are inescapably compelling.

The ethical rationale for the rule is stated in the Code only in general and conclusory terms, by EC 7-18:

> The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason, a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person.

Professor Leubsdorf alludes to other articulated (if not, in his view, respectable) justifications which have been marshalled in support of DR 7-104(A)(1):

> Authorities that go beyond these generalities usually base the rule on the danger that lawyers will bamboozle parties unprotected by their own counsel. [Citing authorities.] A less dramatic possibility is that conversations between a non-lawyer and an adverse lawyer will lead to disputes about what was said, which may force the lawyer to become a witness. [Citing ABA Code DR 5-101(B), DR 5-102.] Professor Kurlantzick has imaginatively developed some related justifications: Protecting the client from inadvertently disclosing privileged information or from being subjected to unjust pressures;...helping settle disputes by channeling them through dispassionate experts;...rescuing lawyers from a painful conflict between their duty to advance their client's interests and their duty not to overreach an unprotected opposing party;... and providing parties with the rule that most of them would choose to follow anyway. [Citing Kurlantzick, *The Prohibition on Communication With An Adverse Party*, 51 Conn. B.J. 136, 145-46, 148-49, 152, 153-54 (1977),] Leubsdorf, *supra* at 686-87.

Thus, we understand there to be three concrete dangers with which DR 7-104(A)(1) may be principally concerned: a presumed imbalance of skill between a lawyer and layman which gives one an unfair advantage over the other; a risk that an uncounseled party dealing with a lawyer for an adverse party will make admissions or concessions, or reach judgments, from which his lawyer could protect him; and the occurrence of circumstances, in the absence of the rule, which might compel a lawyer to become a witness in a case or otherwise be forced to make difficult choices between advancing a client's interest and not overreaching in communication with an unprotected opposing party.

The extent to which these dangers actually exist is, in our view, open to serious question. A majority of the committee believes that in instances where the dangers are not illusory, they are nevertheless outweighed by the cost to clients of applying DR 7-104(A)(1), whether those clients are involved in litigation or other legal matters with the government, or private corporations or individuals. Because we essentially agree with Professor Leubsdorf that the decision to allow or preclude communication between an opposing lawyer and a client should rest with the client rather than his counsel, because the existing rule can often be costly to clients and frustrating to the equitable and advantageous (to clients) settlement of disputes, and because DR 7-104 may lead to the "conscious or unconscious subordination of the interests of...clients" to their attorneys[8] without serving any compelling interest in protecting the client, we presently are considering proposing to the Board of Governors of the Bar an extensive modification of Rule 7-104, essentially consistent with the views of many respondents to our request for comments on our tentative draft opinion, which will merely require that notice be given of intent to communicate with government officials. The majority of our committee presently favors a proposal that goes beyond those comments to the extent that, consistent with Professor Leubsdorf's proposal, it would replace DR 7-104's proscriptions on communications by a lawyer with an adverse party in favor of a notice requirement not only in the context of communications with government officials, but with all adverse parties.

While we believe and will propose that DR 7-104 should be fundamentally changed, nevertheless, we are constrained to acknowledge, pending any modification of the Rule, that it seems quite clearly to have been intended by the ABA and the District of Columbia Court of Appeals to apply to government officials, in light of the "case history"—if not the "legislative history"—of the rule. Consequently, our responsibility at this time is to determine what government officials might be deemed to be "parties" with whom the rule restricts communications, and in what circumstances such restrictions come into play. Certainly the dangers at which the rule traditionally has been thought to be directed have somewhat different qualities, and different weights, in circumstances where one of the adverse parties is a government or governmental agency or official, than where only private parties are involved. Unquestionably, there are significant differences between the govern-

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[5]The footnotes to the Code "are not intended to be an annotation of the views taken by the [framing committee]." See note 6, below.

[6]There was no such provision in the California State Bar's Code at the time, and there still is none. That Code has been revised since the promulgation of the ABA's Code to follow the latter's general system of designation. Thus, what used to be Rule 12 in the California State Bar's Code is now Disciplinary Rule 7-103. Although the text has been slightly altered, it still includes an explicit governmental exception and has no provision regarding communications with persons not represented by counsel. The whole matter of the standing of California Rule 7-103 is made no less confusing by word received from the Department of Justice, one of the respondents to the Committee's request for comments on our original draft opinion, that the Department has been "informed by the State Bar that its Board of Governors, after several years of study, has tentatively adopted a new rule which deletes this exception and thereby affords the government party the same protection as the private party. The impetus for the proposed rule change apparently arose from several communications which jeopardized the legal position of state agencies involved in litigation." Letter of March, 1979 from Associate Attorney General Michael J. Egan to the Committee, p. 4, n.5.

[7]In the Preamble and Preliminary Statement to the Code, a footnote explains that:

> The footnotes are intended merely to enable the reader to relate the provisions of this Code to the ABA Canons of Professional Ethics adopted in 1908, as amended, the Opinions of the ABA Committee on Professional Ethics, and a limited number of other sources; they are not intended to be an annotation of the views taken by the ABA Special Committee on Evaluation of Ethical Standards.

This is not much help in the present instance, since Rule 12 is demonstrably *not* the source of DR 7-104, nor even one of its sources. See note 1 above.

[8]See Leubsdorf, *supra* at 693.

ment, or its officers, as parties to litigation or negotiation, and merely private parties. Such differences may be found in the nature of the interests represented, in the manner in which responsibility for litigation is exercised, in the broad scope of intercourse between private parties and the government on intermeshing policy and litigation issues, and in the likely level of sophistication of the individuals involved in that intercourse. Additionally, a fundamental constitutional right—the right of petition under the First Amendment—very well may be construed to preclude an attorney from "causing another"—his client—to communicate with a government official.

A government official as a party is simply an adverse contestant; he or she is, for purposes of the dispute, whatever it is, the representative of the public whose true interest is not that government officials win a case but that justice is done.[9] As a result, the danger that a government official, even one involved in litigation, may make an admission that his counsel might prevent him from making is not necessarily a reason for forbidding the communication; indeed, it may suggest that the communication should be permissible. However, DR 7-104(A)(1) is not limited to communications by counsel which are directed to discovering evidence or securing admissions of fact. It applies to contacts that may lead to the execution of a contract or the settlement of a claim short of litigation. Insofar as a government official may have authority to act with respect to such matters and the purpose of the contact is to persuade the official to act, there is no reason to presume that whatever the official decides to do, in the absence of counsel, will necessarily be the right thing to be done from the point of view of the public interest.

The assumption that an uncounseled layman may be induced to make a decision adverse to his best interests if he is contacted directly by a lawyer for another party may also not be fully transferable to a governmental context. It is surely to be hoped that government officials, at least where they have significant decision-making authority, are reasonably sophisticated, and capable of resisting any importunings that are not genuinely persuasive in determining their perception of what is in the public interest. We are, however, aware of no basis for a conclusive presumption that government officers, simply because they are such, will be sufficiently sophisticated to be at no disadvantage in dealing with a lawyer when the subject dealt with is one as to which a determination has been made that the matter requires a lawyer's skill (the matter being one, by hypothesis, where a government lawyer has become involved)—nor for making such a presumption applicable to officers of federal, state and local governments alike.

We note that government representation in litigation, at least where the federal government is involved, also differs from private litigation in significant respects. The Code is quite explicit in stating that, where the merits of a cause are involved, "the authority to make decisions is exclusively that of the client, and if made within the framework of the law, such decisions are binding on his lawyer." EC 7-7. Thus, there may be substantial ground for concern that an uncounseled layman may be persuaded by an artful lawyer to make conclusive decisions that are unwise or unsound—a danger against which DR 7-104(A)(1), of course, provides protection. This customary relationship between lawyer and client, however, has been changed by Congress where federal government litigation is involved, for 28 U.S.C. §§ 516-18 reserve to the Attorney General and the Department of Justice the conduct of virtually all litigation involving the United States, its officers, and its agencies. This power may effectively give to government litigation counsel greater authority to decide what position will or will not be taken in a lawsuit.[10] Hence, to the extent there is any danger of undue influence by private counsel over a federal official's judgment, the government counsel posesses the authority to check what he concludes is a clear abandonment of the public interest.

These statutory provisions, however, apply only to the federal government, and not to states or municipalities—or to the District of Columbia. They apply, moreover, only to actual litigation, and not to the execution of contracts or the settlement of claims short of litigation. While the statutory provisions may make DR 7-104(A)(1)'s protections unnecessary in the area of their operation, therefore, they clearly leave much unprotected. It should be observed, too, that these statutes bespeak, in the federal government context, precisely the sorts of policy concerns that we understand to underlie DR 7-104(A)(1).

One respondent, in reply to our request for inquiries on our tentative draft opinion, argued that the "broader scope of dealing" between private parties and the government on intermeshing policy and litigation issues distinguishes such relationships from the "private model" on which DR 7-104(A)(1) is based:

> ... Thus, organizational and individual plaintiffs who have brought suit to challenge certain government actions may have a long-standing agenda containing many legitimate policy objectives closely related to the subject of the litigation... [T]hey have a legitimate interest in discussing these matters with government officials. [And]... [t]he government official as "client," unlike his or her non-governmental counterpart, is charged with action in the public interest and must therefore hear the view and perspectives of important segments of the public. Memorandum of May 10, 1979 to the Committee from the Washington Council of Lawyers, pp. 5-6.

On the other hand, the fact that a *public* as well as a *private* interest is implicated where a governmental official is involved argues that the services of counsel, if required at all on the public side, should not be hampered or rendered ineffective. The ultimate interests involved on the government side, in a case involving a governmental party, are those of the public: the government officer with whom the hypothetical communication by opposing counsel is to be had is simply a representative of the general public. It follows that if a government lawyer is involved, the ultimate client of that lawyer is also the very same general public for whom the government officer stands proxy. Requiring as an ethical matter that opposing counsel will not communicate with the public's representative without the consent of the public's counsel provides some assurance that such counsel will have a full opportunity to protect the interests of his ultimate client.

Finally, there can be no doubt that contacts with government officials may involve the exercise of the First Amendment right to petition for redress of grievances. And the effective assertion of that right, particularly when the voices of individuals or groups might not otherwise be heard, may of course depend on the availability of counsel to present the "petition." We do not, however, understand this most fundamental right to mean that a private party, in litigating or negotiating with the government through counsel, has a right to have the government unrepresented by counsel, or to have government's counsel's representation of the public's interests less effective than the representation available for the private party's interests.

Our conclusion, in sum, is that the considerations of underlying policy which tradi-

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[9]Thus EC 7-13 states that the "responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict" (citing the famous passage to that effect in Berger v. United States, 295 U.S. 78 (1935)). Similarly EC 7-14 notes that a "government lawyer in a civil action or administrative proceeding has the responsibility to seek justice...."

[10]Most of those who responded to our request for comments on our tentative draft opinion in response to inquiry No. 75-11-9 believe that for most practical purposes Department of Justice litigation counsel effectively have the final authority to decide what position will or will not be taken in a lawsuit. However, general counsel of the Departments of Defense, Treasury and Commerce and the legal advisor to the Department of State disagreed "strongly" with this perception, asserting that "in general, federal agencies represented in litigation by the Department of Justice have the same prerogatives possessed by a private sector client to determine the position to be put forward on the client's behalf." Letter of May 11, 1979 to the Committee from Herbert J. Hansell, Legal Advisor, Department of State; Deanne C. Siemer, General Counsel, Department of Defense; William B. Skidmore, Acting General Counsel, Department of Commerce; and Robert H. Mundheim, General Counsel, Department of the Treasury.

tionally have been thought to justify DR 7-104(A)(1), as well as the history and text of the rule, suggest that to the extent that it should be applicable at all, it should have some application to communications with government officials. It remains to consider the scope of that application.

II.

The critical question in this connection is, which governmental official or officials should be considered to be the "party," within the meaning of DR 7-104(A)(1), with whom communications by opposing counsel are restricted? The government itself, or an agency of government, may be the named party in litigation, or a prospective "party" to a contract being negotiated, in a technical sense, but of course one cannot communicate with such an abstract entity, any more than with a corporation or other legal creature, except through some individual person. The problem is to identify the governmental officers who, for purposes of the rule, are deemed to stand for the governmental party.

It is of course important that the identification of such officials be no more inclusive than necessary to serve the purposes of the rule, so that there will be no unnecessary hindrance to the search for information or the pursuit of grievances. The lines may not be drawn so widely as to include all government employees at whatever level of responsibility, for of course not all employees can speak for or commit their employer, whether it be public or private. Nor should the rule extend to government employees who are merely witnesses, or otherwise sources of information, but who have no decisional authority with regard to the subject matter of the representation, for such an extention would inhibit the search for truth without protecting any governmental interest legitimately sought to be protected by the rule.

The line of limitation cannot be described in perfectly precise terms, for it will necessarily depend in part on the facts of each particular situation where DR 7-104(A)(1) may be called into play, and the possible factual variables are too numerous to be encompassed in any concise formula. The guiding principles can nonetheless be easily enough stated in general terms. The persons who stand in the stead of a government party for purposes of the rule should be those, and only those, who have power to commit or bind the government with respect to the subject matter in question: that is, the authority to institute, compromise or terminate litigation (or to authorize any of these), to settle claims short of litigation (or to authorize their settlement), to execute contracts or approve their terms, to make substantive (as opposed to ministerial) decisions concerning the issuance of licenses and the award of government grants, or to perform statutorily authorized rule-making functions.

The limited circle of officials so described is, we think the minimum necessary to serve the policy purposes of the rule. It is the actions such persons can take, purportedly on behalf of—and in any event binding on—the ultimate public client, which should have the benefit of the public's counsel where such counsel has been assigned. It is the insulation of those actions from the undue influence of counsel for a private interest which the rule would properly provide for; and no more.

This construction of the rule would find support also in such precedent as is available. The predecessor of DR 7-104(A)(1), Canon 9, was interpreted to allow an attorney of a claimant against a store to interview an employee of the store, on the ground that the store, not its employee, was the adverse party, ABA Formal Op. No. 117; and a similar distinction is generally made as to corporations, as between policy making officers and employees, both for ethical purposes, see Drinker, *Legal Ethics* (1953) at 201 and N.Y. City Bar Assn. Op. 830, and for other legal purposes, *e.g., 2 Fletcher Cyc. Corp.* (Perm. ed.) §266 (distinction between officers, who "are the corporation," and mere agents or employees); Fed. R. Civ. P. Rule 30(b)(6) (deposition of a "public or private corporation or a partnership or association or governmental agency," may be taken through "officers, directors or managing agents.")

III.

The third and final question we have undertaken to address concerns the other factual variables determining the situations in which DR 7-104(A)(1) applies. Everything falling under this head has been mentioned in the course of the preceding discussion, and requires no more than brief recapitulation here. As has been made clear, we understand DR 7-104(A)(1) to have application only in cases where the word "party" is applicable in a relatively formal sense: that is, the Government, a governmental agency or a governmental official in his or her capacity as such is a named party in litigation, is a party in interest in negotiations short of litigation (and so a prospective party to the litigation if the negotiations fail), is a party or prospective party to a contract under negotiation, or prospective party to a contract under negotiation, or is involved in substantive decisions concerning the issuance of licenses, the award of government grants, or rule-making proceedings. The rule has no application even in such circumstances unless counsel has specifically been given responsibility for representing the governmental party in the matter and the private party's counsel has effectively been notified of that fact. This would, of course, ordinarily be the case where litigation has actually commenced, but not necessarily where the negotiations are in lieu of litigation, and perhaps relatively rarely where only contractual negotiations are involved. The subject matters with respect to which communications are restricted by the rule (by a requirement of counsel's consent or legal authorization) are in all instances solely those which not only are the subject of the private lawyer's representation but also have been specifically entrusted to a designated government lawyer or lawyers. And the rule applies only to such matters as to which the lawyer's responsibilties on both sides extend; it does not encompass communications on any other matters, even though they may be related. Thus, for example, the disciplinary rule might in a given case prohibit direct communication with a policy-making official related to a proceeding to enforce an administrative rule against the client of the private lawyer, and yet not prohibit direct contact for the purpose of urging the rescission of the rule itself. Finally, we do not construe the rule to apply in circumstances where the governmental party sought to be contacted is a dissenting member of a multi-member board or commission and the decision being challenged by the attorney initiating the contact is one on which the board was split. Clearly, by hypothesis, the dissenting commissioner or board member in such a circumstance favored the position asserted by the attorney's client and consequently, no interest would be served by prohibiting such a communication. See New York State Bar Opinion 404, August 13, 1975, New York State Bar Journal, October, 1975, p. 526.

Inquiry No. 75-11-9
Approved: December 18, 1979

Opinion No. 81

DRs 2-101(A), 2-101(B), 1-102(A)(2), 2-102 (B), 2-102(C)—Legal Advertising and Referral Service Subscribed to by Unaffiliated Private Practitioners to Advertise Under the Name "Legal Counsellors"

The inquirer is a business organization which provides advertising services for attorneys. The basic structure of the business involves contracts with participating attorneys, who pay a specified fee for the right to participate in an advertising program for a specified period of time. The business group prepares and places advertisements in the radio and TV media, identifying the name of the business entity, and a telephone number. No individual attorneys are identified in the advertisements. Calls to the number are answered by an employee of the business group. The employee, after receiving a description of the caller's problem, contacts one of the participating attorneys, who in turn contacts the prospective client. Each attorney who has contracted for the services of the business organization indicates one or more of seven areas of practice in which he or she will accept referrals from the business organization. In the Washington area, it is contemplated that the

attorney would also indicate the jurisdiction(s) in which the attorney practices: Washington, Maryland or Virginia. The referrals are made on a rotating basis.

Charges to individual participating attorneys are to be based upon the number of areas of practice designated as well as the number of jurisdictions in which the attorney practices. The charges are unrelated to the number of referrals made to the participating attorneys.

The inquirer states that the employees answering the initial call offers no advice and quotes no fees. The agreement between the participating attorneys and the business organization contains no provisions regarding the fees which may be charged to clients who contact the attorney as a result of a referral through the telephone calls to the number listed in the advertisements.

The organization proposes to use the name "The Legal Counsellors" in advertisements[1] directed to the Washington area market.

The business organization has furnished the script of one advertisement, and a cassette tape of the audio portion of a television advertisement. The advertisements use such phrases as "The Legal Counsellors, comprised of attorneys who are knowledgeable in the ways of the law and who are waiting to help you," and "The Legal Counsellors, specialists in the meaning of the law. The Legal Counsellors are comprised of attorneys who want to offer you their knowledge and services. . . ." The advertisements also state that the rates charged are "reasonable and affordable."

In Opinion 70, this Committee addressed an inquiry concerning the propriety of attorney participation in a joint advertising service which provided a telephone number through which referrals were made to participating attorneys. It was the view of the Committee that such a service constituted a lawyer referral service within the meaning of DR 2-103(C), and hence that an attorney could not pay the fees of any such service unless it was operated, sponsored or approved by the District of Columbia Bar or a bona fide bar association. The service described by the inquirer is indistinguishable from that involved in Opinion 70, insofar as the "referral service" issue is concerned. Accordingly, an attorney cannot properly participate in the joint advertising/referral service unless such service has been approved by the Bar or a bona fide bar association. An interim exception to the prohibition on attorney participation in such services is found in Opinion 70A of this Committee which concluded that an attorney could, without violating DR 2-103(C), participate in such a service if that service had pending a request for approval from the District of Columbia Bar, and also had requirements for participating attorneys which were identical to those of the Lawyer Referral and Information Service (LRIS) operated by the District of Columbia Bar.

The inquiry which the Committee addressed in Opinions 70 and 70A provided information concerning the organizational structure and mode of operation of the joint advertising program involved. This Committee was not furnished any specific advertising material, and hence had no occasion to consider the propriety of particular advertisements. The inquiry which is the subject of this Opinion, however, furnishes the verbatim text of various proposed advertisements. The Committee has examined the script of one proferred advertisement, and has listened to the recording which furnished the audio portion of another. It is the view of the Committee that both advertisements violate DR 2-101(A), because they are "misleading" and "deceptive," and, as well, "might reasonably be expected to induce reliance by a member of the public."

The scheme for regulating lawyer advertising which has been adopted by the District of Columbia Court of Appeals in its order of July 13, 1978 generally permits such advertising, prohibiting only such advertising as is false, fraudulent, misleading or deceptive. The principal limitation on attorney advertising is found in DR 2-101(A), which provides:

> DR 2-101 Publicity and Advertising
>
> (A) A lawyer shall not knowingly make any representation about his or her ability, background, or experience or that of the lawyer's partner or associate, or about the fee or any other aspect of a proposed professional engagement, that is false, fraudulent, misleading, or deceptive, and that might reasonably be expected to induce reliance by a member of the public.

DR 2-101(A) is further implemented by DR 2-101(B), which sets forth certain specific (albeit not exclusive) circumstances which render publicity or advertising "false, fraudulent, misleading or deceptive." DR 2-101(B) provides:

> (B) Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:
>
> (1) Contains a material misrepresentation of fact;
>
> (2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
>
> (3) Is intended or is likely to create an unjustified expectation;
>
> (4) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
>
> (5) Relates to legal fees other than:
>
> (a) A statement of the fee for an initial consultation;
>
> (b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive.
>
> (c) A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;
>
> (d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter:
>
> (e) The availability of credit arrangements; and
>
> (f) A statement of the fees charged by a qualified legal assistance organization in which he or she participates for specific legal services the description of which would not be misunderstood or be deceptive; or
>
> (6) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

Upon examination of the advertising material furnished by the inquirer, the Committee finds it misleading in at least two respects.

First, the advertising creates the clear impression that the "Legal Counsellors" is a group of attorneys practicing together in some form of group practice. This impression of the advertising material is shared by both the attorney and non-attorney members of the Committtee, but the reaction of the latter is particularly significant since DR 2-101(A) prohibits misleading and deceptive advertising only if it "might reasonably be expected to induce reliance by a member of the public." The impression is created because the advertising material uniformly refers to "The Legal Counsellors" as if it were a group of attorneys available to assist prospective clients. Phrases such as "the Legal Counsellors—specialists in the meaning of the law" and "the Legal Counsellors are waiting to help you" clearly convey the impression that it is "the Legal Counsellors" who are equipped to provide legal services to clients and to interpret the law. In fact, "The Legal Counsellors" is merely the name for a joint advertising and referral service, which, based upon the information furnished in the inquiry does not purport to practice law. Indeed, from all that can be gleaned from the inquiry, the organization has no one associated with it who would lawfully advise clients.

The very name proposed for the organization is deceptive; for an organization which is not engaged in legal practice at all to call itself "The Legal Counsellors" is inherently deceptive and misleading. There is, in fact, no organization of attorneys; each of the participating attorneys retains exactly the

[1]Rule E-11 of the Legal Ethics Committee of the District of Columbia Bar specifies that, "[e]xcept as otherwise provided in these Rules or as determined in a particular case by vote of the Committee, the identity of any person requesting an opinion will be treated as confidential and will not be disclosed. . . ." In this instance, the Committee concluded that disclosing the name of the group whose activities were the subject of the opinion was essential to an understanding of the analysis embodied in the opinion. Accordingly, the Committee by vote authorized the limited disclosure which is involved, as an exception to its usual practice.

same form of practice which he or she engaged in prior to joing the joint advertising program. Even if the name were changed, however, an advertisement which suggests the existence of an organization of or affiliation between attorneys for the purpose of legal practice, where no such organization or affiliation exists, would be misleading and deceptive.

Thus the advertising in question is "likely to create an unjustified expectation" within the meaning of DR 2-101(B)(3), which is the most directly applicable of those provisions of DR 2-101(B) that describe what statements are "false, fraudulent, misleading, or deceptive" and thus proscribed. Whether they should or not, members of the public unquestionably do have an expectation that a lawyer in a law firm or a group of lawyers practicing together in some way is different from a single lawyer merely taking part in a joint advertising campaign. In addition, and for the same kind of reason, the advertising may be regarded as "omit[ting] to state" material facts "necessary to make the statement...not misleading," DR 2-101(B)(2), and as containing representations "likely to cause an ordinary prudent person to misunderstand or be deceived" and to contain "reasonable...disclaimers necessary to make [the] representation...not deceptive," within the terms of DR 2-101(B)(6). Indeed, the crux of the deceptive and misleading nature of the advertising, material to reveal the real nature of "The Legal Counsellors" and to advise those hearing the advertisements that what is involved is merely a commercial referral service.

While not directly applicable, DR 2-102 (B) and (C) support the view that advertising which may mislead or confuse potential clients as to the nature of the legal organization with which a lawyer is affiliated is to be condemned. DR 2-102(B) indicates that a lawyer shall not "practice under" a name which is "misleading as to the identity, responsibility or status of those practicing thereunder." DR 2-102(C) prohibits a lawyer from holding himsel for herself out as "having a partnership with one or more other lawyers unless they are in fact partners." While the lawyers participating in the joint advertising referral program here may not technically be "practicing under" the name The Legal Counsellors, they are very close to doing so by supporting advertising which could create that impression. And while there is no suggestion of actual partnership in the advertising material, there is the suggestion of some form of affiliation. The point is that DR 2-102(B) and (C) manifest a special concern that the public receive an absolutely accurate impression concerning the nature of the legal organization of which a lawyer is a part; that concern provides an additional compelling reason, if one were required, for finding that the advertising material in question violates DR 2-101(A).

Second, the statements concerning fees in the proposed advertisements are in a form which is prohibited by the terms of DR 2-101 (B). DR 2-101(B) permits *no* statements regarding fees except those which are *specifically* permitted by DR 2-101(B)(5)(a)-(f), *supra* at 5. A statement that fees are "reasonable" or "affordable" is not permitted by any of the subparts of the disciplinary rule. Such a statement does not inform a prospective client of the fee for initial consultation, or of the fee for a specific legal service; nor does it state a range of fees or specific hourly rates. Thus, the statements made with respect to fees fall outside the specific limits established by DR 2-101(B) (5), rendering them a violation *per se* of DR 2-101(A).

This opinion interprets the provisions of the Code of Professional Responsibilty; the Code applies only to members of the Bar, and does not apply directly to the activities of a commercial organization which publishes advertising material paid for by members of the Bar. This opinion, therefore concludes that no member of the District of Columbia Bar may, without violating the provisions of DR 2-101(A), participate in a joint advertising service which proposes to offer advertisements containing the kinds of statements referred to above, given the nature of the joint advertising service and the specific claims made in the advertising. It is the responsibility of every member of the Bar to know the content of any advertising material which he or she is sponsoring, as the attorney remains responsible for such content. A member of the Bar cannot avoid liability under DR 2-101(A) by leaving the development of specific advertising claims in the hands of a service to which a fee is paid; DR 1-102(A) provides that a lawyer may not "[c]ircumvent a Disciplinary Rule though the actions of another." This principle applies to joint advertising programs of the kind addressed in this opinion.

Approved: December 18, 1979

Opinion No. 82

DR 9-101(B), DR 4-101(B)(3), Canons 2, 4, 5, 9 and 27, DR 2-102(A)(2), DR 2-101, DR 2-101(A), DR 2-101(B)(4), DR 9-101(B), EC 2-8A, DR 9-101(C), EC 9-2, EC 9-6—Advertising by Former Government Attorney Detailing Nature of Prior Government Experience and Announcing Willingness to Handle Claims and Litigation Against Government

Synopsis

This inquiry involves the propriety of an advertisement by a former government attorney, in private practice, who places a newspaper advertisement describing his prior government position and the nature of his experience, and announcing his availability for suits against agencies of the United States Government. The Committee concludes that the adverstisement in question does not violate any of the Disciplinary Rules under Canons 2, 4, 5 or 9, but that the element of inviting representations against a former client, although not a violation of a Disciplinary Rule, was inconsistent with EC 9-2 and 9-6.

Facts Presented

The inquirer has furnished to the Committee a copy of an advertisement placed in a national newspaper by an attorney. In the advertisement, the attorney announces his resignation from a position as an attorney employed by an agency of the federal government. The attorney describes the nature of his activities while employed by the government, specifically mentioning his participation in the investigation and settlement of certain major claims. In addition, the attorney characterizes his work for the government as involving "in-depth factual and legal analysis" of the claims. Finally, the attorney notes that he has returned to private practice and is now available for consultation with respect to the handling of claims and litigation against "any agencies of the United States government."

The inquirer asks whether an advertisement of this nature is consistent with an attorney's ethical obligations under the Code of Professional Responsibility, and specifically whether it is proper to solicit representations opposing the interests of former clients.

Questions Presented

The inquiry implicates three distinct areas of the Code of Professional Responsibility: *First,* the scope of permitted advertising under the recently revised Canon 2; *second,* the scope of an attorney's duty of loyalty to a former client, under Canon 4; *third,* because of the element of changing sides from a public position to private practice, the "appearance of impropriety" provisions of Canon 9.

Discussion

In responding to this inquiry, the Committee has assumed that the attorney placing the advertisement will not become involved in representing private interests in connection with any matter as to which the attorney had substantial responsibility while in public service. If he were to do so, he would not only violate the provisions of DR 9-101(B), but might also violate the parallel criminal provisions of 18 U.S.C. §207(a). Similarly, the Committee has assumed that the attorney placing the advertisement will not permit himself to be involved in any matter within his area of responsibility while in government service in a fashion which would violate the provisions of 18 U.S.C. §207(b)-(c).[1] The Committee also assumes that the

[1]The scope of prohibitions under 18 U.S.C. § 207(b)-(c) varies, based on the prior grade of the former government employee involved, as a result of recent amendments to 18 U.S.C. §207. *See* Title V of the Ethics in Government Act of 1978, Public Law 95-521, October 26, 1978, 92 Stat. 1864-67, as amended by Public Law 96-98, June 22, 1979, 93 Stat. 77-78.

advertising attorney will not, as proscribed by DR 4-101(B)(1), "use a confidence or secret of his client to the disadvantage of the client." Finally, the Committee assumes that he will not, in violation of DR 4-101(B)(3), "use a confidence or secret of his [former] client for the advantage of himself or of a third person unless the [former] client consents after full disclosure." These provisions of DR 4-101 apply to confidences and secrets of *former* as well as *present* clients.[3]

With respect to representations in which an attorney will be acting in opposition to the interests of a former client, it is important to note that there are certain prohibitions arising under Canons 4 and 5, applicable to all attorneys without regard to former government affiliation. DR 9-101(B) prohibits private employment in a *matter* as to which an attorney previously had substantial responsibility while in government service. However, under the Canon 4-Canon 5 restrictions, any attorney may be disqualified from representing interests opposed to those of a former client if there is a "substantial relationship" between the new representation and the prior representation. Under some circumstances, the substantial relationship test may produce a broader disqualification than that encompassed in the definition of "matter" under DR 9-101(B). For example, an attorney may represent the government in connection with a particular claim involving a particular contractor. A subsequent claim involving a different contractor might be viewd as a distinct "matter" for purposes of DR 9-101(B), but there might nonetheless be a "substantial relationship" between the new claim and the prior claim. Obviously, application of the substantial relationship test can be applied only after full examination of the facts of particular situations, and there is no indication on the face of the inquiry which would justify inferring that any particular representation induced by the advertisement would be improper.[3]

The question which is thus directly presented by the inquiry is whether the advertisement cited, or the activities plainly contemplated by that advertisement, would violate provisions of the Code of Professional Responsibility even if the attorney were to conduct himself in a fashion consistent with Canons 4 and 5, and DR 9-101(B).

We turn first to the question of restrictions on attorney advertising. Prior to the recent amendments to Canon 2, in the wake of the Supreme Court decision in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), virtually every form of attorney advertising directed to the general public was prohibited. Hence the kind of advertisement involved here would have been in violation of the prior provisions of the Code of Professional Responsibility without regard to the prior status of the advertiser as a government employee. *See* former DR 2-101(A) and DR 2-101(B). Limited exceptions were made for certain forms of professional announcements. However, under prior DR 2-102(A)(2), even a professional announcement card could not state biographical data except to the extent "reasonably necessary to identify the lawyer or to explain the change in his association." The same provision specifically permitted a lawyer's announcement card to state his or her "immediate past position." Even under the provisions of former Canon 27, it was considered proper for an announcement card to state the immediate past government position of a lawyer undertaking a new affiliation, although Canon 27 did not specifically so provide. *See* ABA Formal Opinion 301 (1961).

Under Canon 2 as amended by the District of Columbia Court of Appeals in 1978, the permissible scope of lawyer advertising has been greatly broadened. Generally speaking, subject to certain specific exceptions, advertising which is not false, fraudulent, misleading or deceptive, is permitted. *See* DR 2-101. The provision of prior DR 2-102(A)(2), with respect to the listing of immediate past positions is omitted. There appears to be no provision in the current Disciplinary Rules under Canon 2 which applies to the kind of advertising referred to by the inquirer.

There is a provision in DR 2-101(B)(4), which prohibits advertising "intended or... likely to convey the impression that the lawyer is in a position to influence *improperly* any court, tribunal, or other public body or official." (Emphasis added.) The Committee does not believe that the kind of statement of prior government position, including the statement designed to emphasize the attorney's particular qualifications for engaging in litigation against his former employer-agency, can fairly be interpreted as conveying an impression of capability to exert *improper* influence. There is nothing inherently improper about a former government attorney, who otherwise complies with the provisions of the Code of Professional Responsibility and applicable law, undertaking to utilize expertise of a *general* nature (and not involving client confidences or secrets) gained in his prior government employment in subsequent representation of private clients. On the other hand, if the attorney were to suggest an ability to have matters resolved other than on the merits by his former colleagues, that would, in the judgment of the Committee, convey an impression of ability to influence a government agency on improper grounds, and violate DR 2-101(B)(4).

The Committee concludes that no Disciplinary Rule under Canon 2 is applicable to the factual situation set forth in the inquiry.

The Committee has considered the applicability of EC 2-8(A). That Ethical Consideration does contain a statement that "prominence should not be given to a prior government position outside the context of biographical information." However, the quoted language is merely an example designed to illustrate the more general principle set forth in the preceding sentence: "Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide [the public benefit derived from useful advertising]." The advertisement which is the subject of the inquiry does not appear to fall within the general principle, nor does it appear to manifest any of the excesses which are referred to, and the use of biographical information does not appear to provide undue emphasis upon "unrepresentative" biographical information. It is the view of the Committee that EC 2-8(A) was not intended to preclude the essentially accurate and truthful disclosure of information concerning prior government employment, at least where such disclosures are in reasonable balance with the entire advertising message which is being conveyed. In reaching this conclusion, the Committee was aware of, and influenced by, the fact that attorneys with prior government experience are free, in person-to-person contacts with prospective clients, to describe and characterize their prior government service in a fashion not materially different from the description contained in the advertisement subject to consideration here. It appears unnecessary and undesirable to interpret EC 2-8(A) in a way which would preclude truthful and accurate advertising disclosure with respect to prior government experience when the identical disclosures made in direct conversation with prospective clients would not be subject to criticism under any provision of the Code of Professional Responsibility.

A further question is the propriety of the advertisement under Canon 9, which provides that "A lawyer should avoid even the appearance of impropriety."

The limitations of DR 9-101(B), prohibiting representation of private interests by a lawyer who previously had substantial responsibility for the same matter as a government employee have already been noted, *supra* at 2.

DR 9-101(C) makes it improper for a lawyer to "state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official." This provision is similar in import to that of DR 2-101(B)(4). The discussion of the latter provision (*supra* at 6) applies to DR 9-101(C) as well; more than simply cataloging the details of prior government experience is necessary to justify the conclusion that a lawyer is implying the capacity to exert improper influence.

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[3]*See e.g.*, ABA Informal Opinions 1293 (1974) & 1361 (1975).

[3]For an extensive discussion of attorney disqualification in the context of the "substantial relationship" test, see Leibman, *The Changing Law of Disqualification: The Role of Presumption and Policy,* 73 Nw. U.L. Rev. 996 (1979).

The Committee concludes that no Disciplinary Rule under Canon 9 prohibits the advertisement in question here. Since previous portions of this opinion have indicated that, based on the facts disclosed in the inquiry, there are no Disciplinary Rules under other potentially relevant Canons (2, 4 and 5) which prohibit the advertising which is the subject of this inquiry, the Committee concludes that the advertisement in question is not prohibited by, or unethical under, the Code of Professional Responsibility. This conclusion reflects the view of a majority of the Committee that conduct which does not violate a Disciplinary Rule cannot properly be characterized as "unethical." Such conduct may nonetheless be inconsistent with one or more Ethical Considerations, and hence inconsistent with the aspirational objectives of the Code: As the preamble and preliminary statement of the Code of Professional Responsibility state, "the Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive." While every member of the District of Columbia Bar should be encouraged to pursue and achieve the aspirational objectives set forth in the various Ethical Considerations, a majority of the Committee is not prepared to characterize deviations from the Ethical Considerations as "unethical."

While the Committee is unwilling to brand the conduct described in the inquiry as unethical, it is not prepared to endorse or encourage succh conduct, which is inconsistent with certain Ethical Considerations. EC 9-2 exhorts lawyers, when "ethical guidance does not exist" to act "in a manner which promotes public confidence in the integrity and efficiency of the legal system and the legal profession." In a similar vein, EC 9-6 refers to the duty of lawyers to, among other things, "conduct [themselves] so as to reflect credit on the legal profession and to inspire the confidence, respect and trust of [their] clients and the public."

The Committee is of the view that the advertisement in question will not (1) promote confidence in the integrity and efficiency of the legal profession, or (2) reflect credit on the profession, or (3) inspire confidence in the profession on behalf of clients and the public. This conclusion is not related to the essentially biographical disclosure of prior government position and the activities undertaken in such prior position, which we assume to be truthful and accurate. Had the advertisement stopped at that point, the Committee would view the advertisement as presenting no impropriety under the Code of Professional Responsibility. But the advertisement goes further; it announces the availability of the advertising attorney for consultation with respect to claims and litigation against "any agencies of the United States Government." The public and prospective clients are not likely to have a favorable impression of an attorney who, having spent a number of years in the full time employment of a particular client, in this case the United States Government, leaves that employment and publicly announces his or her special qualifications to initiate claims or litigation against such former client. An analogy can be drawn to situations not involving prior public service. Suppose an attorney were to work as counsel for a private company for many years, and were thereafter to withdraw from representing that private client. A *public* announcement by the attorney of his or her availability to engage in representation directly *opposed* to the interests of the long-time former client would surely undermine the public confidence in the profession; clients rightfully expect that they can retain attorneys without having such attorneys subsequently engage in public pronouncements that their prior engagement renders them peculiarly well suited to current activities opposing the interests of former clients. While the Committee recognizes the existence of differences between prior representation of private interests, it is of the view that such differences as may exist between the two situations do not invalidate the analogy which is made above. Accordingly, the Committee concludes that such conduct would offend both the Bar and the public, both where the prior representation was private in nature and where it involved representing governmental interests. It undermines trust, confidence and respect for the profession, and is therefore inconsistent with the objectives of EC 9-2 and 9-6.

In summary, the Committee concludes that no Disciplinary Rule under the Code of Professional Responsibility as currently in force in the District of Columbia prohibits advertising of the kind in question here.[4]

Opinion No. 83

DR 4-101; DR 4-101(A); DR 4-101(C)(2); EC 4-4—Duty to Protect Confidences of Former Client In Face of Potential Court Order to Compel Testimony or Production of Documents

Synopis

This inquiry raises the issue of the extent of a lawyer's duty to protect information obtained from a former client. That information is now being sought by opposing counsel in a lawsuit, and the court may order the attorney to reveal it. We conclude that DR 4-101 obliges the attorney not to reveal any confidences or secrets of a former client; that the concept of "secrets" encompasses information beyond that which may be legally privileged; and that the lawyer's obligation to maintain confidences and secrets is terminated to the extent he is compelled to reveal them by law, order of court, or by provisions of the Code of Professional Responsibility.

Facts Presented

The inquiring attorney represented the client several years ago in an estate matter, at which time he succeeded in having his client named guardian of her minor child. The client was seeking to protect her child's interests in the deceased father's life insurance policy. Upon her appointment as guardian, the client formally terminated her relationship with the inquirer.

The proceeds of the insurance policy were eventually divided between the child and another relative of the insured pursuant to an agreement signed by the client. The inquirer had no part in this subsequent transaction. The former client, now represented by another attorney, has challenged that agreement, and has filed suit on behalf of the child to recover the rest of the insurance money. She alleges that she was coerced and fraudulently induced into signing the agreement to divide the proceeds. The case is proceeding to trial, and the inquirer finds himself a potential, although unwilling, witness.

The client's opposition sought to depose the inquirer, but he invoked attorney-client privilege and refused to answer. His refusal survived a motion to compel before the trial judge. Now, however, opposing counsel has filed a motion to compel the inquirer to produce documents in his files which were gathered during that former representation. He will also be called as a witness during the upcoming trial.

The inquirer has asked his former client through her new counsel, if she would be willing to waive her privilege and allow him to testify, but she has steadfastly refused.

Questions Presented

The inquirer directs the following questions to the Ethics Committee:

1. Would my compliance with a request to produce documents in my file concerning the statement subsequently signed by my former client, copies of the statement and/or copies of any letters to my former client from the attorneys, amount to a violation of the attorney-client privilege?
2. Would the attorney-client privilege be violated by my answering questions at trial concerning the existence of such documents in my file?
3. Would it be a violation of the attorney-client privilege for me to reveal any advice I may have given to any former client in regard to the request from defendant-attorneys? (Defendant-attorneys assert that statements made by me to my former client do not fall within the privilege.)
4. In the event that the trial judge reconsiders and orders me to testify about any communications with my former client, is such a court order sufficient to allow me to testify about otherwise privileged communications?

[4]The Committee is nonetheless concerned that its conclusion leaves former government officials free to publicly invite retainers which involve litigation against former clients. The Committee has therefore asked its Code Subcommittee to consider the desirability of a specific Disciplinary Rule dealing with such situations.

Discussion

Initially, it is important to clarify the jurisdiction of the Ethics Committee before attempting to respond to these questions. The mandate of the Committee is to render advisory opinions regarding the application of the Code of Professional Responsibility within the District of Columbia. Corollary to this general mandate are Committee Rules C-4 and C-5, which state that the Committee will generally not consider issues which are the subject of current or impending litigation, nor will it offer opinions on legal questions. The Committee's work is limited to advisory opinions on strictly ethical matters.

Having said this, we must begin our response by distinguishing between the legal concept of "attorney-client privilege" and the ethical obligation to preserve the secrets and confidences of the client under DR 4-101 of the Code of Professional Responsibility. Many of the inquirer's questions in effect seek advice as to the extent of the attorney-client privilege.

The concept of attorney-client privilege is an exception to the general rule in American jurisprudence granting access to all potentially relevant material.[1] Professor Wigmore has said:

> Nevertheless, the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete.... It is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle. 8 Wigmore, Evidence § 2291 at 554 (McNaughton rev. ed. 1961).

The extent to which information or documents can be protected by the invocation of the privilege is a matter of how broadly or narrowly the particular courts will construe the privilege. *See, e.g., In re Transocean Tender Offer Securities Litigation,* 78 F.R.D. 692 (N.D. Ill., 1978) ("attorney client privilege obstructs free and full disclosure and should be narrowly construed").

The court which is presented with the privilege claim will also have to make factual determinations about the communications in question to determine whether the privilege properly applies. For example, it will have to determine whether any prior or subsequent revelations to a third party might have constituted a waiver of privilege. *See, e.g., United States* v. *Pollock,* 414 F. Supp. 203 (D.D.C. 1976). It may also inquire into the exact nature of the communication. Recently, there has been disparity of opinion among various courts as to the extent to which communications *from* the attorney *to* the client are covered by the concept of attorney-client privilege.

This Committee has neither a sufficient factual predicate nor the authority to determine any of these issues. Specific rulings on questions of attorney-client privilege are within the domain of the court in which the current litigation is pending.

The question of the inquirer's duty to protect the "secrets and confidences" of his client[2] is related to, but not identical to, the issue of attorney-client privilege. DR 4-101 (A) defines the term "confidences and secrets" as follows:

> 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Thus, the provision of the Code equates "confidence" with privileged information, but requires as well that the attorney also guard a broader category of information known as "secrets."

EC 4-4 confirms that the ethical requirement to protect information extends beyond that which is privileged:

> The attorney client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike evidentiary privilege, exists *without regard to the nature or source of information or the fact that others may share the knowledge.* (Emphasis added.)

Thus, whether or not the information sought in this case is privileged (*i.e.,* a "confidence") is not dispositive in determining the scope of the attorney's duty under the Code. The information may well be a "secret" within the meaning of the Disciplinary Rule, and if so, the attorney is ethically bound not to disclose it.

The duty not to disclose secrets of a client under DR 4-101(A) prohibits not only disclosures which "would be embarrassing or... likely to be detrimental to the client," but also flatly prohibits disclosures of information "gained in the professional relationship" which the client has asked to be "held inviolate." And, as EC 4-4 makes clear, information classified as a secret does not lose that classification because of the nature or source of the information, or the fact that others may be aware of it. Here the client has specifically instructed the attorney not to disclose the information in question, and on the facts presented it appears likely that some or all of the information is properly classified as a secret. Certainly, it would appear that any advice furnished by the attorney to his former client would constitute a secret, whether or not under applicable law it is also privileged, and hence also a "confidence."[3]

We conclude, therefore that there could be a variety of kinds of information which the attorney has received as the result of his relationship with the client which could constitute "secrets" under the rule, when, as here, the former client has indicated a desire that the attorney protect that information. The attorney should decline to furnish such information in response to discovery requests or investigation by the opposing counsel.

However, even a valid claim that information constitutes a "secret" of the client will not prevent a court from compelling an attorney to disclose the information.[4] If the information is not in fact within the attorney-client privilege (a "confidence"), and no other qualified privilege such as the work-product doctrine prevents disclosure, the attorney may properly be compelled by a court to disclose a secret which a client would prefer not have disclosed. Without attempting to delineate the responsibility of the attorney in situations where the client is not present and able to protect its interests by appropriate submissions to the court, in the circumstances presented by this inquiry it would be the client's obligation, acting through her current attorney, to take appropriate steps to attempt to prevent disclosure. The obligation of the inquirer, the former attorney, is simply not to voluntarily compromise the client's position.

Ultimately, of course, the client's position may be rejected by the tribunal, and an order may issue directing the attorney either to respond to questions or to furnish documentary material. Under those circumstances, the attorney is not obliged to run the risk of being held in contempt of court because of the client's desire that confidences and secrets not be disclosed. This circumstance is specifically contemplated by DR 4-101(C)(2), which states:

> (C) A lawyer may reveal:
> ...(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

In summary, the attorney has a duty to his former client to protect her confidences and secrets. That duty continues until the attor-

[1] A general discussion of this issue can be found in "Note: Evidence-Privileged Communications:" The Attorney-Client Privilege in the Corporate Setting, 69 Mich. L. Rev. 360 (1970).

[2] The duty to protect confidences and secrets runs to former clients as well as present clients, and it is therefore not material that the attorney-client relationship has been terminated. *See* ABA Informal Opinions 1293 (1974) and 1301 (1975).

[3] Since the question of protecting the secrecy of client information was involved in the inquiry, the inquirer quite properly did not reveal the specific information or testimony sought by the opposing parties in the court proceeding. Accordingly, it is not possible for the Committee to offer an opinion as to whether any or all of the items constitute secrets entitled to protection under DR 4-101(A). Furthermore, the Committee has not undertaken to define the scope of the phrase "information gained in the professional relationship," as that phrase is employed in DR 4-101(A).

[4] Obviously, if the information is privileged, it is also a "confidence" within DR 4-101(A); a ruling by the court on the privilege issue also effectively determines whether information subject to the ruling is a confidence.

ney is compelled by his obligations under the Code of Professional Responsibility, by law, or by order of a court, to do otherwise. When such an order is received, the attorney's ethical obligation to the client is overridden by the order, and he is obliged to comply.

Opinion No. 84

DR 4-101; DR 5-105; DR 9-101(B)—Potential Disqualification of Lawyer Who Formerly Served in Government in Nonlawyer Position; Conflict of Interest; Confidences and Secrets of Government Client; When Representation of Private Client in Different Proceedings Constitutes Same "Matter"; Imputed Disqualification

In this opinion, we have occasion to decide when two separate legal proceedings constitute the same "matter" for purposes of disqualification under Canon 9. We conclude that DR 9-101(B) precludes a former government employee from representing a client in connection with possible claims against a party that had been involved in government proceedings in which the lawyer formerly participated, where the private engagement would depend upon related factual and legal issues.

Facts

A lawyer in private practice has asked us to consider the propriety of his personal participation in advising an existing client of his firm. The client is seeking advice about possible legal action against a competitor; the competitor was the subject of legal proceedings brought by two government agencies for which the inquiring attorney worked as an economist prior to his admission to the bar. A major issue in the government legal proceedings was the status of that competitor under the antitrust laws. The proposed litigation being considered by the client of the inquiring attorney's firm is an antitrust suit against the competitor. He asks whether his prior government service bars him and his firm from proceeding with the representation.

The inquiring lawyer actually took part personally in the government legal proceedings in his capacity as an economist (1) by participating in interviews conducted by government attorneys of executives of competing companies and (2) by analyzing documents, including documents that were obtained from the company that was the subject of the government proceedings. The lawyer informs us that most of the documents that he reviewed were or became part of the public record and that he has no independent recollection of any other information.

After completing law school and being admitted to the bar, the inquiring attorney resigned from government service and became associated with a law firm. The client that has asked the firm to consider possible antitrust action was represented by the firm during the inquiring attorney's service as a government economist. During the government proceedings, the firm submitted a legal analysis to one of the government agencies on behalf of the client setting forth a position that was apparently adverse to the competitor. Among the documents of the competitor that were reviewed by the inquiring attorney while he was with the government were documents relating to the relationship between the competitor and the client that now seeks advice about a possible private civil antitrust action. The inquiring attorney also participated in interviews of executives of another company in the industry that competes both with the target competitor and with the client that his present firm represented and continues to represent.

Issues

The firm's representation of that client in giving antitrust advice about the competitor —and the inquiring lawyer's possible personal participation in the representation— raise a number of questions. The principle issue is the propriety of pursuing claims on behalf of private clients that are similar to those that were pursued against the same defendant while the lawyer was in government service.

Questions could be raised about the lawyer's use of information obtained about the prospective defendant or its competitors while in government service to feather his private nest after leaving government service. The use of confidential information acquired in government service as an aid to a private client could easily be perceived as an abuse of official position and would raise questions under the Code of Professional Responsibility. If the individual lawyer is disqualified from personal participation in the representation, there would arise the vexing question of possible imputed disqualification of the entire firm.

The potentially apt disciplinary rules that might apply are DR 4-101 (maintaining confidences and secrets), DR 5-105 (representng conflicting interests), and DR 9-101(B) (participating in "matters" handled while government service). In the matter before us, we find that, although DR 4-101 and DR 5-105 would not bar the inquiring attorney from participation in the representation, DR 9-101 does prevent him from doing so.

Discussion

1. *Confidences and Secrets Obtained by Government Lawyers and Non-Attorney Staff.*

DR 4-101 requires that a lawyer maintain the confidences and secrets of his clients, even after his engagement ends, and prohibits him from using those secrets or confidences for his own advantage or the advantage of a third person without the client's consent. These restrictions represent some of the key provisions that prohibit "switching sides" or profiting from confidential government information. But there is no apparent violation here.

We begin by expressing our belief that an economist working with government lawyers in litigation may come into possession of information that is protected by the attorney-client privilege as a confidence. The same may be said for secrets as defined by the Code. We also assume that the government as client is entitled to at least some of the protection of DR 4-101. The inquiry before us, however, does not suggest that the inquiring attorney will be using the confidences and secrets of the government for his own benefit or for the benefit of his current law firm's client. He informs us that the relevant information on which he worked came from parties other than the government, and DR 4-101 thus appears inapplicable. Of course, to the extent that the lawyer became privy to litigation strategy questions, he could not use that information to benefit his firm's client without the government's consent.

2. *Avoidance of Conflict With Interests of Former Client.*

Under Canon 5, a lawyer is to avoid certain entanglements that might impair his independent professional judgment. The disciplinary rule that is arguably applicable, DR 5-105, is expressly directed at the simultaneous representation of two or more clients with potentially conflicting interests. In our Opinion No. 63, we treated this rule as having a somewhat broader application and as entitling even a former client to bar a lawyer from an adverse representation that has a "substantial relationship" to the prior one.

That test, however, is clearly not applicable here. First, the inquiring attorney was not serving as a lawyer in the government. Second, there is no indication that the firm's representation is in any way adverse to the government's interests or that the government has any objection.

3. *Restrictions on Practice of Former Government Employees.*

The principal provision of the Code that deals with the professional responsibility of lawyers who have left government service is Canon 9, which directs lawyers to avoid even the appearance of impropriety.

In response to recommendations by this Committee, the Board of Governors of the District of Columbia Bar petitioned the Court of Appeals in February 1979 to make comprehensive changes in Canon 9 to provide clearer guidance to former government lawyers and their firms. That petition has not been decided. The pending inquiry, however, must be answered under the present Code.

DR 9-101(B) provides:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

Under the facts provided to us, the pro-

posed conduct of the inquiring attorney would conflict with this disciplinary rule. Our conclusion rests upon the fact that the client is seeking to engage the lawyer in the same "matter" in which he had substantial responsibility as a government employee.

(a) *Applicability to former non-lawyer government employees*

The fact pattern presented in unusual in one sense: the inquiring attorney was not a lawyer and was not serving as a lawyer when he was employed by the government. Nevertheless, DR 9-101(B) covers situations of this type, if its other tests are met, since it refers to service as a "public employee" rather than a "public lawyer." We regard the choice of terms as a deliberate and proper one, since a more typical case may involve a lawyer who serves in an administrative capacity in the government and then leaves to resume the practice of law. We have little doubt that the Code bars a lawyer from undertaking a representation in a matter in which he exercised substantial responsibility while a public official, even if that responsibility was not that of a lawyer.

(b) *"Substantial responsibility" test for staff member*

On the facts presented, we also conclude that the inquiring lawyer had "substantial responsibility" in the government proceeding. His role was that of a professional staff member actively involved in the teams that investigated and litigated those proceedings. While he may have had little authority to make major decisions about those proceedings, his involvement was direct, extensive, and substantive, not peripheral, clerical, or formal.

(c) *Determination of same "matter"*

Of greater difficulty here is whether the proposed engagement involves the same "matter" as the term is used in the Code of Professional Responsibility. We have found no authoritative or comprehensive definition of this critical term. The American Bar Association Committee on Ethics and Professional Responsibility stated in its Formal Opinion 342 (November 24, 1975):

> Although a precise definition of "matter" as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

The facts before us lie between the two extremes discussed in Formal Opinion 342. We do not confront the "same lawsuit" or the same issues of fact between the "same parties." Nor, however, are we concerned merely with abstract antitrust principles.

In our prior opinions, while applying the term to specific contracts, proceedings, claims or disputes that are the same, we have concluded that the term "matter" must have some breadth. See Opinion Nos. 16, 26 and 50. The purpose of the ethical prohibition demands that it extend, for example, beyond instances where there is simply an identity of the formal parties. Thus, even though the advice sought would concern possible antitrust litigation on behalf of private client, we deem that undertaking as involving substantially the same matter. As we understand the situation, many of the underlying facts as well as the pertinent legal principles are the same. The competitor that would be the object of the legal advice and potential private claims is the same party that was the target of the government proceedings. In addition, the firm's client actually became embroiled in the government proceedings as a non-party witness and source of information.[1]

In the recent decision by the United States Court of Appeals for the Second Circuit in *Armstrong* v. *McAlpin*, 606 F.2d 28 (2d Cir. 1979) (petitions for rehearing granted) the court found that DR 9-101(B) applied to a situation in which the court-appointed receiver of a company sought to engage as his counsel in a case the law firm that had recently hired as an associate the former SEC official who had directed the investigation that led to the filing of the case and the appointment of the receiver in it. We do not necessarily agree with the court's insistence that the entire firm be disqualified in that case despite a screening mechanism, but it is obvious that the same "matter" was involved, even though the representation did not involve switching to an adverse party. The court seemed to assume that the test for determining what constitutes a "matter" is whether the kind of activity involved raises a risk that the exercise of governmental authority may be "influenced by the prospect of future employment...." That risk is present here.

Further analogous support for our conclusion appears in the Eighth Circuit's decision in *Arkansas* v. *Dean Foods Products Co.*, 605 F.2d 380 (8th Cir. 1979). In that case the court held that Canon 4 and Canon 9 required the disqualification of a state assistant attorney general and two members of his staff in an antitrust case that he was directing. The state official had been an associate in private practice at a time when his firm was representing a company that later became one of the antitrust defendants. In those proceedings there had been allegations of price fixing but those allegations were not then pursued. In the firm's representation during the earlier proceeding, "considerations of sales, structure, customer lists, and purchases" were involved and an "integral element" of that proceeding was the allegation of price fixing that was later levelled by the state in the case directed by the firm's former associate. The court found that the two matters were "substantially related" for purposes of the principle that allows a former client to disqualify a lawyer who may be perceived as having switched sides.

While the facts before us do not involve the same sort of "switching sides," the very close relationship between basic facts, pertinent principles, and interested parties suggests that we have here the same "matter" within the meaning of DR 9-101(B). The test used for joinder under the Federal Rules of Civil Procedure also offers some guidance and leads to a similar conclusion. Rule 20 permits persons to join together in a single action if they claim a right to relief "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurences...." Although we do not suggest that the test under DR 9-101(B) is quite this sweeping, that inquiry may help determine when formally separate undertakings or proceedings constitute essentially the same "matter."

This opinion addresses only the concerns of the Code of Professional Responsibility. If the inquiring lawyer's access to any of the documents or witnesses when he was a government economist was covered by protective orders, those orders would constitute independent restrictions upon his conduct. Of course, we do not purport to pass upon any other restrictions that may have been imposed by the Ethics in Government Act of 1978, particularly 18 U.S.C. § 207 as amended, or by the Trade Secrets Act, 18 U.S.C. § 1905. Of interest, however, are the regulations issued under the Ethics in Government Act that define the term "matter" as it relates to post-government employment and possible conflicts of interest:

> The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve *the same basic facts, related issues, the same or related parties*, time elapsed, the same confidential information, and the continuing existence of an important federal interest, 5 C.F.R. § 737.5(c)(4) (1979) (emphasis added).

[1] In Informal Opinion 1374 (Sept. 7, 1976), the ABA Ethics Committee summarily concluded, without discussion, that the same "matter" was involved and that DR 0-101(B) thus barred former SEC staff lawyers from representing any parties in a private civil suit who had been witnesses in the SEC proceedings that the lawyers had handled and that give rise to the civil suits. The test applied was that the civil claims "arise directly out of the matter which [they] prosecuted" as attorneys for the SEC.

Although the inquiring attorney and his firm must look elsewhere for guidance in considering the possible impact of these federal regulations, this pragmatic concept of "matter" supports our interpretation of DR 9-101(B).

Under all the circumstances, we therefore conclude that the Code bars the inquiring attorney from personally participating in advising his firm's client on the subject described and from participating in any related litigation.

4. *Possible Application of Principle of Imputed Disqualification.*

Finally, the Committee comes to the inquiring lawyer's question whether his personal disqualification would be imputed to his firm. The extent to which personal disqualification under Canon 9 should lead to the imputed disqualification of the firm, and possible exceptions to any imputed disqualification, are the subject of the proposals for amendments to the Code of Professional Responsibility that are pending before the District of Columbia Court of Appeals. *See* "Final Revolving Door Proposals Submitted to D.C. Court of Appeals," *District Lawyer,* (April/May 1979) at 47. The requirements under the present Code are a matter of dispute. *Compare* ABA Formal Opinion 342, *supra,* with *Armstrong* v. *McAlphin, supra.* Under the circumstances, the Committee declines to issue an opinion in response to this question.

Inquiry 79-6-20
Approved: January 23, 1980

Opinion No. 85

DR 2-110(A)(2), DR 2-110(C)(1)(d), DR 2-106—Withdrawal From Representation of Uncooperative Client

The inquiring lawyer asks whether he may withdraw from the representation of a client who has been uncooperative in ways he describes.

Our opinion is that, in the circumstances that the inquirer relates, which are stated below, he may withdraw from the representation if he takes reasonable steps to avoid foreseeable prejudice to the client.

The particular representation concerns injuries suffered by the client's minor child and the child's dog when they were struck by an automobile. The inquiring lawyer has represented the client in other matters over a period of 10 years. The lawyer and the client made a written agreement as to the representation in the automobile accident matter. It empowered the lawyer to negotiate an out-of-court settlement of the claim, if possible, or to file suit if need be. He was to receive one-third of any settlement, two-fifths of any recovery, and he was authorized to pay any hospital and doctor's bills not otherwise paid from the proceeds of any settlement or judgment. Several months after the representation was undertaken, the lawyer had what he considered sufficient information to begin negotiations looking toward a settlement. The driver's insurer made an offer ($350) that the client orally authorized the lawyer to accept. Upon being advised of the acceptance, the insurer sent to the lawyer a check for the $350, payable jointly to the lawyer and the client. Endorsed by both, it was deposited in the lawyer's trust fund, from which he made disbursements: one-third to himself, an amount to pay a hospital bill and the remainder to the client ($145).

Nearly five months later the client came to the lawyer's office bringing with her the check for $145 and informing him that she wished to rescind the settlement and bring suit because her son was suffering headaches and had other physical disabilities that she attributed to the accident. The lawyer took medical attention for her son and to talk again with the officer who prepared the accident report. He then drafted a letter to the insurer and a rescission of the release resulting from the settlement and sent the rescission to the client for her and her husband's signatures.[1] She promptly telephoned that she was coming to the lawyer's office with the signed rescission. She did not appear on that day or later and took no affirmative steps otherwise to communicate with the lawyer. The lawyer wrote another letter inquiring whether anything was wrong and telephoned the client several times. Each time she said she was "on her way" or "would be in tomorrow," but she has not appeared. The lawyer believes, on the basis of his prior experience with the client, that the delay will continue for months and he will be left without authorization or instructions. (He says that the interval between his retention and his opening negotiations with the insurance company was caused in part by the client's slowness in providing information.)

DR 2-110(C)(1)(a)-(c) and (e)-(f) specify types of client conduct that make it permissible for a lawyer to withdraw from a representation; subparagraph (d) more generally permits a lawyer to withdraw from a representation if his client "[b]y other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively." The inquiring lawyer obviously believes that the point of unreasonable difficulty in carrying out his representation of the client has been reached. On the basis of what he has told us, as summarized above, we cannot disagree with his judgment.

If the subject matter of the representation were before a court, we would advise the lawyer to lay the problem before the court and obtain its consent before withdrawing. That is because the real party in interest is the client's minor child and not the client. The distinction between a minor client and an adult in a case comparable to this one was drawn by the Committee on Professional Ethics of the Association of the Bar of the City of New York. A lawyer wanted to know whether he could withdraw after an agreement to settle litigation, authorized by a guardian ad litem (a father), was repudiated by the minor plaintiff who was the lawyer's client, and the lawyer's request for further instructions went unanswered. The committee said that, "if the client were an adult, the attorney would be justified in withdrawing from the case, but as the rights of an infant are involved, the Committee thinks that the attorney should lay the situation before the proper Court for its instructions." Opinion No. 172, Feb. 6, 1931. Here there appears to be no court that would have jurisdiction to instruct the attorney. Because of the presence of the minor party in interest, however, the lawyer before withdrawing should be especially attentive to DR 2-110(A)(2), which says that

> "a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules."

The lawyer also asks what should be the disposition of the checks he has drawn from the settlement proceeds to himself, to the hospital and to the client. Upon withdrawal, he should return to the client the check for $145 that she brought to him. It appears that nothing further need be done until and unless an effective rescission of release is executed and the insurance company insists that the settlement be undone. Where the obligation to undo the settlement would then lie seems to the Committee a question of law and not of professional responsibility. The answer would depend in part at least on the precise terms of the retainer agreement. On the facts as they have been related to us, we cannot say that, as a matter of professional responsibility, it would necessarily be unreasonable and therefore unethical, DR 2-106(B), for the lawyer to retain as a fee the agreed percentage of the rescinded settlement. Compare Opinion No. 37. We do not believe that the lawyer has an ethical obligation to ensure that the insurance company is reimbursed for what the lawyer in good faith paid to the hospital or to the client. Whether the lawyer has a legal obligation to return the fee or to ensure that the insurance company is reimbursed for the amount of the other two checks written against the proceeds of the settlement is a question on which we do not undertake to opine. Questions of law are outside the Committee's jurisdiction and we are not sufficiently informed in any event.

Inquiry No. 79-8-28
March 18, 1980

Opinion No. 86

DR 5-101(A)—Continued Participation in

[1]The inquirer does not state whether rescission would be as of right or would require the agreement of the insurance company.

Litigation By Attorney Sued For Conduct in Course of Litigation

Synopsis

An attorney sued for alleged conduct in the course of litigation may continue in the original representation if his client in the original suit consents to continued representation after full disclosure of the potential conflict, including a discussion of the possibility that the suit against the attorney may affect the attorney's vigor in pursuing his client's suit or his inclination to suggest settlement.

The Facts

This inquiry raises the question whether an attorney who is sued by an opposing party for his alleged conduct in conducting litigation must withdraw from the original representation. The attorney represents conservators of an estate in a malpractice suit against several physicians. The suit alleges negligence and fraud by the physicians in the care and treatment of the deceased.

Two of the defendant physicians have sued the inquirer for alleged conduct in the course of the original litigation and a prior malpractice suit brought on behalf of the same plaintiffs against the hospital. Five of the seven counts of the physicians' complaint have been dismissed; the two that remain allege slander and interference with prospective advantage, based upon a statement allegedly made by the inquirer to a potential patient in the physician's waiting room. The inquirer's client witnessed the alleged statement.

Upon receiving the order dismissing five counts but allowing two to remain, the inquirer wrote to his clients advising them to retain other counsel because of "the possibility of a conflict of interest," noting particularly that one of his clients had been a witness to the inquirer's statement in the physician's waiting room. His client responded, acknowledging that she witnessed his statement, but stating that she did not recall what had been said and did not perceive a conflict of interest. She further stated that "it was not deemed feasible to retain other counsel in this case" and she urged him to continue in the representation.

The inquirer states that he has considerable familiarity with the facts of the case because of his litigation of similar action on behalf of the same clients against the hospital. He further notes that the other defendants in the original suit have obtained dismissals of the actions against them on a theory which might also be available to the remaining defendants. For this reason, the matter would not be attractive to another attorney on a contingent fee basis. The inquirer believes that suit was filed against him to force him to withdraw from the original representation.

The inquirer asks whether he has a conflict of interest that would prohibit him from continuing in the representation. Specifically, he asks whether the possibility that his client could be called as a witness in the suit against him creates a conflict. He also expresses a more general concern that his being sued might be viewed as affecting his professional conduct in the initial litigation.[1]

Analysis

The relevant disciplinary rule is DR 5-101(A) which states:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

The rule prohibits a lawyer with a personal interest in the outcome of a case from representing a client in that case without the client's consent.[2]

In the situation presented, there is a risk that the attorney will be influenced by the suit against him and that his professional judgment in representing his client will be affected. Specifically, his vigor in pursuing his client's suit or inclination to suggest settlement may be affected by the suit against him, depending upon the legal and factual strength of the claim against the attorney, whether the attorney is protected from liability by insurance, etc. Thus, we cannot exclude the possibility that existence of the suit may have some effect on the lawyer's judgment.

DR 5-101(A) provides that the client may consent to continued representation by the inquirer after "full disclosure" of the conflict. Here, the inquirer has informed his client that he may have a conflict of interest but, other than pointing to the possibility that the client may be a witness in the suit against the attorney, he has not explained the source of possible conflict or its potential effects. As we stated in Opinion 68,

> [F]ull disclosure requires an attorney to call the possible problem of impaired judgment—not simply the underlying facts—to the attention of his or her client, insofar as such a possibility is reasonably foreseeable.

The inquirer has told his client that she may have to testify in the slander suit and she appears to understand that. As long as he would not be acting as her attorney in that matter, no further disclosure of this source of conflict is necessary.

The inquirer has not, however, adequately addressed the principal source of conflict. He should inform his clients—preferably in writing—of the specific burdens that being sued places on him, *i.e.*, the commitment of his time, the necessity of hiring an attorney, the risk to his own financial position and the possible harm to his professional reputation, etc. He should explain that these factors may affect his judgment in pursuing the original suit. Specifically, the attorney should inform his client of the potential risk that his involvement in a second suit involving the same opponent may threaten, either directly or indirectly, his resolve in satisfactorily pursuing the client's interests. The slander action may interject itself, however inadvertently, into the resolution of the malpractice action, despite good faith efforts to keep the suits separate. The attorney should specifically note the possibility that termination of the malpractice action may be viewed as a condition of disposition of the suit against him. If the client consents to the representation, the attorney should undertake to inform his client of any linkage of the two actions in settlement discussions or otherwise.

We conclude that a potential conflict of interest is present, but that the attorney may ethically continue the representation if the client consents after full disclosure. The disclosure thus far has been adequate. The attorney is under an ethical duty to disclose the potential conflicts as outlined above. Should the client desire the attorney to continue the representation after such disclosure, the attorney may do so.[3]

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[1]The inquirer calls the Committee's attention to two cases on this point: Babb v. Superior Court of Sonoma County, 92 Cal. Rptr. 179, 479 P.2d 379 (1971) and Berlin v. Nathan, 64 Ill. App.3d 940, 381 N.E.2d 1369 (1978). In Babb, the California Supreme Court reinstated an attorney-defendant's demurrer to a complaint for malicious prosecution of a malpractice suit. The conflict of interest problem concerned the potentially adverse relationship between lawyer and client if the court allowed the plaintiff and his attorney to be named codefendants in a countersuit for malicious prosecution. Similarly, Berlin involved a countersuit for malicious prosecution against the plaintiffs and their attorneys in a malpractice action. The court there noted that if the attorneys were "held liable as insurers of the merits of their client's case" a conflict of interest would arise.

Neither case addresses the issue presented here. In both Babb and Berlin, the cause of action asserted against the attorneys was for malicious prosecution *in consort* with their clients. Here, the attorney alone stands accused of slander and interference with prospective advantage.

[2]Although the rule itself speaks of "accepting" employment, we believe that it applies equally to cases, such as this one, of continuing employment.

[3]The Committee's initial reaction to the inquirer's letters to his clients was discussed with the inquirer while this opinion was being prepared. The inquirer expressed an interest in taking every possible step to adequately advise his clients of the possible effects of the second suit on his conduct of the original action. Based on his discussions with a representative of the Committee, the inquirer prepared a second letter setting forth in considerably greater detail the possible effects of the second suit. The Committee recognizes the difficulty of predicting precisely, and in advance of future events which could have an impact, the potential effects of a second suit on the inquirer's conduct. Giving due consideration to this difficulty, it appears that the second letter satisfies the concerns expressed earlier in this opinion, and complies with the principles set forth in Opinion 68. Based on the second letter, the clients should be able to make an informed judgment whether to seek new counsel or to continue being represented by the inquirer.

Opinion No. 87

DR 2-101(B), DR 2-102(B), DR 2-102(D), DR 3-101—Multi-Jurisdictional Corporate Law Firm Using The Name "Legal Clinic," Offering Credit

The inquirer asks several questions concerning a professional corporation practicing law in the District of Columbia.[1] The group advertises itself as "the Legal Clinics of Smith, Jones and Cohen, a Professional Corporation, Attorneys-At-Law."[2] The persons named in the Corporation's title are not members of the District of Columbia Bar; persons in its Washington office are members of the District of Columbia Bar. Its brochure lists offices in several jurisdictions and indicates the types of problems it will handle, *e.g.*, "domestic relations," "traffic court," "consumer."

1. *Can Such a Professional Corporation Hold Itself Out to Do Business in the District of Columbia?*

The inquirer asks whether a firm may practice in the District of Columbia under the name of attorneys who are not members of the District of Columbia Bar. The Committee assumes that those listed in the firm name are (or were, if deceased) in fact actual members of a bar and are (or were, if deceased) affiliated in the practice of law.

Under DR 2-102(D), a firm may practice in different jurisdictions under the same firm name[3] provided that the firm letterhead and other listings make clear the jurisdictional limitations on those attorneys not licensed to practice in all jurisdictions.[4] See Opinion 34. Although DR 2-102(D) refers to partnerships, we can find no basis for a different conclusion where the firm is a corporation. DR 2-102(B) specifically approves of reference in a firm name to the firm's incorporation and the Code defines "law firm" to include a professional legal corporation. See "Definitions."

2. *Can the Organization Provide an Installment Plan Based Upon Credit Cards?*

As we stated in Opinions 23 and 75, attorneys may accept credit cards in payment for legal services under the conditions set forth in Opinion 75. As we stated in Opinions 11, 60 and 75, finance charges or interest charges on unpaid balances are permissible under the conditions set forth in Opinion 75.

3. *Can a Group Call Itself a "Legal Clinic" If It Is Neither a Non-Profit Organization, a Funded Charitable Organization, Nor Affiliated With a Law School, Bar Association or Other Such Organization?*

A lawyer may not practice law under a firm name that is "misleading as to the identity, responsibility or status of those practicing thereunder." DR 2-102(B). A lawyer may not represent his ability, background or experience in a manner that is "false, fraudulent, misleading, or deceptive, and that might reasonably induce reliance by a member of the public." DR 2-101(A). Under DR 2-101(B), such statements include those which by omission or inclusion misrepresent material facts or contain an "implication that is likely to cause an ordinary prudent person to misunderstand or be deceived."

In *Bates* v. *State of Arizona*, 433 U.S. 384 (1977), the Supreme Court found that the use of the term "Legal Clinic" in a law firm title was not, in and of itself, misleading. Rather, it found that the term had a specific meaning and was appropriately used by the firm involved in that case (433 U.S. at 382):

> We suspect that the public would readily understand the term "legal clinic"—if, indeed, it focused on the term at all—to refer to an organization like that of appellants' that is geared to provide standardized and multiple services.

We believe that the term "Legal Clinic" also implies, to the ordinary prudent person, the availability of low-cost legal services. To use that term without misleading the public, therefore, a law firm must provide "standardized and multiple services" at lower than average prices.[5]

The term "Legal Clinic" could also be thought to imply an affiliation with a non-profit or eleemosynary institution, from which one could assume that the group was offering its services for other than profit-making purposes. In the circumstances of this case, however,we do not find it sufficiently likely that the term, by itself, would be misleading so as to either bar its use or require that the law firm in fact be so affiliated. The firm's brochure is quite commercial in appearance; it offers a broad range of services and a price list; it advertises several offices and convenient hours—days, nights and Saturdays; it includes personal names in the group's title, along with the notation "A Professional Corporation, Attorneys-At-Law." These indicia of a commercial enterprise should disabuse an ordinary prudent person of any notion that the group is a "public interest" group disinterested in private gain.

In sum, a law firm practicing in the District of Columbia may use the term "Legal Clinic" in its title, but with caution. It must, in fact, offer standardized and multiple services. It must provide services at lower than average prices. If it is a commercial enterprise, it must indicate that it is, either by direct statement or by indicia such as those outlined above. And it may imply, by any means, that it is or is affiliated with a charitable or not-for-profit institution.

Opinion No. 88

DR 5-101(B); DR 5-102(A)—Lawyers Serving as Both Witnesses and Counsel in the Same Proceeding—Propriety of Issuance of an Opinion on the Merits

We have been asked by an attorney representing a client whose case is about to go to trial, whether the attorney or the attorney's partner in practice may ethically continue to represent the client now that it appears that the attorney will be required to testify as a witness at trial concerning disputed factual matters. The trial is set for March 26, 1980, and the attorney not only anticipates that the case will be tried as scheduled, but firmly believes that this will be in the best interest of the attorney's client. Accordingly, the attorney has requested that we respond to the present inquiry as promptly as possible, and we have issued this opinion on an expedited basis in accordance with Legal Ethics Committee Rule E-10. Because the matter involved in this inquiry is presently in litigation, and because the ethical propriety of the proposed conduct turns directly upon factual determinations that cannot fairly be made on the basis of *ex parte* presentations, the Committee declines to issue an opinion on the merits of this inquiry pursuant to Legal Ethics Committee Rule C-4.

I.

According to the facts recited in this inquiry, the inquirer has represented a particular client for approximately five years in connection with a dispute between the client and the client's former attorney. The former attorney was also a co-trustee with the client of a Minnesota testamentary trust which named the client and the client's children as beneficiaries. In July 1975, the client and the former attorney terminated their attorney-client relationship, their co-trustee relationship and their trustee-beneficiary relationship. At that time the former attorney agreed to prepare a First and Final Account and to distribute the trust corpus with the

[1] The inquirer asked four questions. Three questions are answered here; a response to the fourth, concerning affiliation between lawyers and other, non-lawyer, professionals, is currently under consideration by the Committee.

[2] Pursuant to Rule E-6 of the Rules of the Legal Ethics Committee, which mandates that opinions not identify lawyers or firms involved in the inquiry, the name of the firm has been changed.

[3] Technically, DR 2-102 applies to partnerships of attorneys from various jurisdictions who wish to practice under the same name in all of the jurisdictions. Although the instant situation—where none of the persons in the firm name are licensed in this jurisdiction—is not technically covered by the rule, we find that it falls within the appropriate scope of DR 2-102.

[4] If only the firm's name, and not a listing of attorneys, appears on firm stationery, the jurisdictional limitations on the attorneys in the firm's name need not be noted. If there follows a listing of attorneys, however, such limitations must be noted.

[5] While the Supreme Court in Bates permitted a law firm to advertise "very reasonable" prices, where such an assertion was truthful, DR 2-101 (B) prohibits all representations as to legal fees except those which set forth credit terms or specific fees, ranges of fees or rates charged for specific services. We note, in this regard, that the use of the phrase "low cost" in the law firm's brochure falls within the prohibition of DR 2-101(B)(5).

approval of the Minnesota court. Also at that time, the client retained the inquirer to provide legal assistance in insuring the proper distribution of the trust assets.

Since July 1975, the inquirer has attempted unsuccessfully to get the former attorney to prepare the necessary accounts and take the other actions necessary for a final distribution of the corpus of the trust. The former attorney's alleged lack of cooperation resulted in the December 1977 filing of the suit involved in this inquiry. The suit, filed in the Superior Court of the District of Columbia, seeks an accounting and damages for legal malpractice and breach of trust by the former attorney. After four aborted trial dates and two interlocutory appeals, a fifth trial date has been scheduled for March 26, 1980. However, in January 1980, the inquirer learned that the former attorney would contest certain facts pertaining to the relations between the inquirer and the former attorney in connection with the subject litigation. This will require the inquirer to testify as a witness at trial. As a result, the former attorney now appears to be threatening to file a grievance with the Board of Professional Responsibility of the District of Columbia Bar if the inquirer does not withdraw as counsel for the client.

In response to this perceived threat, the inquirer advises that he contacted the Bar Counsel who is said to have indicated that there would be no ethical impropriety in continued representation if the former attorney agreed to the continued representation. The former attorney has not agreed and apparently will not do so. The former attorney has also refused to agree to a procedure under which the inquirer's law partner would conduct the trial in light of the inquirer's participation as a witness. In addition, the problem has been brought to the attention of the Superior Court, but the Court has declined to rule on the matter. The Court has indicated that it will not disqualify the inquirer and that the former attorney should address any objections to the inquirer's conduct to the Board on Professional Responsibility. The inquirer has now asked this Committee to issue an opinion concerning the ethical propriety of continued representation.

II.

The issue raised in this inquiry is governed by DR 5-102(A) which states:

> DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.
>
> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

DR 5-101(B) states:

> DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgement.
>
> ****
>
> (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Unless one of the four exceptions in DR 5-101 (B) applies, the general rule is that a lawyer must withdraw as counsel once it is apparent that he or she will be required to testify at trial. The inquirer has not suggested that any of the first three exceptions would apply. However, the inquirer does suggest that the exception contained in DR 5-101(B)(4) applies because withdrawal after five years of representation would work a substantial hardship on the client. The inquirer believes this to be true not only because five years of familiarity with the case renders the inquirer's continued representation to be of distinctive value to the client but also because the additional delay necessitated by a change of counsel at the present time would seriously and adversely affect the client's interests.

III.

The inquirer's suggestion that DR 5-101 (B)(4) permits continued representation may be supportable. However, we decline to express any opinion on the merits in response to this inquiry. Legal Ethics Committee Rule C-4 states "[t]he Committee will not ordinarily give opinions on specific issues involved in pending litigation." This rule is designed to insure that the Committee does not unduly affect the progress or outcome of litigation by appearing to side with one of the litigants. While such an inference might easily be drawn from the issuance of an opinion concerning a matter in litigation, the inference might well be unfounded because the Committee's opinions are generally based upon, and limited to, an *ex parte* presentation of facts which are simply assumed to be true. Rule C-4 does not state an absolute prohibition, and it could be argued that inquiries involving ethical provisions such as DR 5-102, which necessarily arise only after litigation is commenced, present an especially strong case for issuance of an opinion on the merits. *Cf.* Opinion No. 44. Here, however, there is another reason for declining to address the merits.

In order to determine whether continued representation is permitted under DR 5-101 (B)(4) in the context of this inquiry, the Committee would have to make factual determinations concerning the "distinctive value" to the client of the inquirer's continued representation and the "substantial hardship" to the client that would result from the inquirer's withdrawal. These determinations cannot properly be made on the basis of an *ex parte* presentation by the inquirer. Moreover, the Committee has no fact-finding powers of mechanisms, and while it occasionally deals with inquiries where both sides make presentations to the Committee, it does not in those cases attempt to resolve genuinely disputed factual matters.

The Committee realizes that its disposition leaves the inquirer without direct guidance. However, Opinion No. 44 discusses generally the purposes thought to be served by DR 5-101 and DR 5-102. Although we do not suggest that this opinion controls the present inquiry, it may assist the inquirer in making an independent determination of how best to proceed. Moreover, the Committe's failure to address the merits in no way undermines any inference concerning the good faith of the inquirer that a disciplinary board might wish to draw in any subsequent disciplinary proceeding arising out of this matter. For the reasons stated, the Committee declines to issue an opinion on the merits of the present inquiry.

Inquiry No. 80-2-10
April 29, 1980

Opinion No. 89

DR 2-110(A); DR 2-110(C)(1)(f); DR 4-101 (C)(4); EC 2-32—Propriety of Law Firm Withdrawing From Representation When Client Fails to Pay Fees

Synopsis

A law firm representing a client in a licensing proceeding may withdraw its representation at the conclusion of the first phase of a two-phase process where the client has indicated both by its express statement and by its past actions that it would not pay its bills. The law firm must give the client proper notice of its intent to withdraw and must conform with any applicable rules of the tribunal. The law firm may also institute suit against its former client to recover its fees even though the disclosure of such a suit and the reasons underlying it may adversely affect the position of the former client in the licensing proceeding.

Facts

For the past eight months, the inquiring law firm has represented a client who is seek-

ing a license from an administrative agency in a formal licensing proceeding. The law firm now wishes to withdraw, because the client has repeatedly failed to pay its fees. Fee terms were negotiated in a series of letters between the inquirer and client during May and June of last year. In July the inquirer received a series of post-dated checks to cover the agreed upon retainer of $25,000.

From the beginning, the inquirer reports, there have been problems regarding the client's account. First, the client closed its bank account, the result of which was that only $5,500 worth of the original post-dated retainer checks were ever honored. Since then, there have been repeated requests by the firm for proper payment of the retainer and other fees. Subsequently, the client tendered several sets of substitute checks; these were also post-dated, contrary to a specific agreement between the parties. Most of those checks have been returned unpaid by the bank. Despite continued requests that the client bring its account current, and continued assurances by the client that it would do so, the firm has received only $20,000 to date. As of this inquiry, the firm has billed the client for more than $90,000 in fees and expenses.

In November 1979, the firm began to warn the client that it would not continue representation unless satisfactory financial arrangements were made. The client initially continued its assurances that the bills would be promptly paid. However, in January 1980, it informed the firm that it did not intend to bring the account current. The client was advised at that time that the firm would discontinue its representation unless it fees were paid within a week. The client has never responded. On February 1, 1980, the firm sent a notice by registered mail of its intent to withdraw at the conclusion of the initial phase of the licensing proceedings, which was completed on February 15. A second phase will begin thereafter, with the parties required to exchange exhibits in the middle of March, and a hearing scheduled near the end of the month.

The inquirer asks two questions:

(1) Is its proposed course of action in withdrawing ethically proper? (The inquirer asserts that the rules of the administrative agency do not require counsel to seek permission of the presiding judge in order to withdraw its appearance.)

(2) If it may withdraw, is it barred from instituting a proceeding to recover the fees and costs incurred in this representation while the licensing proceeding is still pending? (The inquirer notes that a pending law suit against a potential licensee must be reported to the agency, and that the very nature of the law suit may prejudice the former client on the issue of whether the client is "financially qualified" to be licensed.)

Discussion

Withdrawal by an attorney is governed by the provisions of DR 2-110. The sections pertinent to this inquiry are DR 2-110(A) and DR 2-110(C)(1)(f), which provide:

> DR 2-110 Withdrawal from Employment.
>
> (A) In general
>
> (1) If permission for withdrawal is required by the rules of tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
>
> (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. . . .
>
> (C) Permissive Withdrawal.
>
> . . .a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:
>
> (1) His client:
>
> . . .(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

The corresponding ethical consideration, EC 2-32, substantially repeats the language found in the rules, and adds only the reminder that "a decision by a lawyer to withdraw should be made only on the basis of compelling circumstances. . . ."

These rules substantially enforce the common law view that an attorney may withdraw for good cause where he or she provides sufficient notice to the client so that no prejudice will result, and where the attorney has received the permission of the tribunal. *See, e.g., Jacobs* v. *Pendel,* 236 A.2d 888 (N.J. App. 1967). Our research has not revealed a single instance where a tribunal or bar ethics committee has dealt with the circumstances of a law firm attempting to withdraw from a representation before an administrative agency. There are, however, more than a dozen ethics opinions from local bar associations[1] and numerous court opinions in other jurisdictions which have dealt with attempted withdrawals from pending adjudication where the client has failed to pay its attorney's fees.

Applying the applicable rules with an eye to available precedent, we conclude that there is no reason why the inquirer could not ethically withdraw in this case.

The first issue which we confront is whether the circumstances related by the inquirer constitute a "deliberate disregard" on the part of the client to pay that attorney his fees within the meaning of DR 2-110(C)(1)(f). We conclude that it does. The failure of the client to pay has generally been considered to constitute good cause for withdrawal. *Jacobs, supra.* This is true even if the failure to pay has resulted from the financial failure of a third party, like an insurance company upon whom the client has been relying, to pay the bills. *McKelvey* v. *Oltman,* 229 N.Y.S. 2d 814 (App. Div. 1962). Some courts have made exceptions to this general rule in cases where the client has attempted in the past to pay its bills, but has been unable to continue because of extremely difficult circumstances. *See, e.g., Kriegsman* v. *Kriegsman,* 375 A.2d (N.J. App. 1977), (client now on welfare had paid more than $2,000 in retainers in a divorce case in which the attorneys billed more than $7,000). The cases deviating from the general rule appear to contain special circumstances. For example, three elements coalesced in the *Kriegsman* case, leading the court to require that counsel not withdraw: *First,* the personal nature of the right which was the subject of the litigation. *Second,* the personal misfortune of the client, who had gone on welfare during the case. *Third,* the continued good faith effort of the client to pay while she was able.

None of these elements is presented in this inquiry. The object of the litigation is to attain a commercial advantage for the client; the client is a business venture pursuing a government license. The client has repeatedly reneged on its promises to pay the attorney and to keep its accounts current. Under the circumstances, the law firm has shown patience and restraint in its dealings. The client's failure to pay its legal bills, exacerbated by its issuance of subsequently dishonored checks on several occasions, clearly constitutes "deliberate disregard" of its obligations and meets the requirements for permissive withdrawal under DR 2-110(C)(1)(f).

A further issue bearing on permissive withdrawal is whether the law firm has provided its client with sufficient notice so that the client will not be prejudiced in the current proceeding. This presents a more difficult question since the client is currently in the middle of a two-step administrative proceeding, and the law firm's withdrawal would take place at a juncture between the two phases. Under the circumstances, we conclude that the law firm has given adequate notice.

It has been suggested that the proper method for withdrawal is for the attorney to notify the client that he will withdraw his representation after a date certain if payment of his fees is not forthcoming. *See, e.g.,* N.Y.Co.L.A. 776 (Opinion 390, 1950).[2] In most of the reported cases, this notice has

[1]Although the full opinions of local associations are not generally available, synopses of these opinions have been collected in Maru & Clough, *Digest of Bar Association Ethics Opinions* (Chicago, 1970) (Supplements published in 1970 & 1975).

[2]Cited in Maru & Clough, footnote 1, *supra,* ¶ 2005. "Where a client has agreed to pay his attorney in advance of trial but has not responded to several letters requesting payment, the attorney should send the client a further letter stating that if the bill is not paid by a certain date, or satisfactory explanation is not given, the attorney will cease representations."

been given before litigation begins. *Jacobs, supra* (notice given less than one month before the initiation of trial was sufficient). Courts have been less willing to allow the attorney to withdraw where the litigation had begun or was immediately pending. *See, e.g., Fessler* v. *Weiss,* 107 N.E.2d 795 (Ill. App. 1952) (withdrawal not permitted where trial was only a "few days" off); *Smith* v. *Bryant,* 141 S.E.2d 303 (N.C. 1963) (no withdrawal permitted on the day of trial).

In those cases, the nature of the proceeding and the rights being adjudicated were very different from those in the instant cases. In almost all reported cases, the controversy was either a tort action or a divorce case which involved substantial personal interests and rights and the impending action was a common law trial. We think the instant case is substantially different. In the present circumstances, the client is involved in an administrative proceeding which has two distinct and separate portions. The subject matter, as stated earlier, is the potential acquisition of a license, a commercial advantage, not a personal right. In the Committee's view, neither the subject matter nor the nature of the proceeding is such that withdrawal between stages by the aggrieved law firm would constitute *undue* prejudice to the client. It has been amply warned of the potential withdrawal and has had time to obtain other counsel. The inquiring law firm has assured the committee that it intends to cooperate in whatever way possible with the client's new counsel in pursuing the ends of the administrative adjudication. Given the commercial nature of the proceeding, and the efforts reported by the law firm, we think that the inquirer "has taken reasonable steps to avoid foreseeable prejudice" and has provided "due notice," in the terms of DR 2-110(A)(2).

Another issue—whether the law firm is obliged to inform the tribunal of its withdrawal, and obtain permission—is more easily dealt with. DR 2-110(A)(1) requires permission only where the rules of the tribunal so requires. The law firm informs us that the agency has no such requirements. If that is true, then the Code imposes no duty, although we do not address whether the agency's administrative judge may have inherent authority, pursuant to his general power to manage proceedings before him, to require such approval.

Thus, in response to the inquirer's first question, we conclude that the law firm may ethically withdraw from its representation of its former client because the client has deliberately disregarded its obligations, the firm having taken proper notice of its intention to do so, and taken reasonable steps to avoid prejudice.

The inquirer's second question is more troubling. Although DR 2-110(A)(2) indicates that a "lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client...", it does not indicate what duty the attorney has once he has properly withdrawn.

It is certainly possible that the initiation of a lawsuit to recover fees by the law firm could undetermine the client's efforts to obtain a license since the suit, and particularly the circumstances underlying it, may be construed by the agency as evidence of the applicant's financial instability. However, this problem was created not by the initiation of a lawsuit, but by the failure of the client to pay its bills. The client-applicant is said to be under a duty to reveal the threat of potential lawsuits to the licensing agency no matter who the plaintiff is. We can see no reason why the inquiring law firm should be forced to place itself at a substantial economic disadvantage simply to afford its former client a favorable, and perhaps unwarranted, economic advantage. Notions of fairness militate against imposing suc a duty where the subject matter of the proceeding is a government license.

We note further that the Code contains a strong policy in favor of allowing attorneys to collect their fees. EC 2-17 explains that "...adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession." *See,* D.C. Bar Ethics Opinion No. 59. The Code does not allow clients who have breached their obligations to pay just fees to use the Code of Professional Responsibility as a shield against the attorney's rightful claims. For example, DR 4-101(C)(4) establishes that a lawyer may reveal even a secret or confidence of a client (or former client) in order to establish or collect his or her fee. Revelation of secrets or confidences presents, in our estimation, a much more dramatic departure from the normal course of attorney conduct than the initiation of a law suit against a former client under the circumstances presented in this case. Yet the rules clearly condone such action.

Similary, DR 5-103(A)(1) permits an attorney to acquire a lien to secure his fee or expenses even where such an acquisition gave the attorney a proprietary interest in the cause of action of subject matter of litigation that he was conducting for the client. Here again the Code provides an exception from the normally followed course of conduct in order to allow the attorney to collect his fee. It is recognized that these exceptions may cause inconvenience to the client, but that they are "deemed to serve an ethical purpose by protecting the right to fair compensation for legal services performed for that client." D.C. Bar Ethics Opinion No. 59. We think the policy in favor of collection fees should govern in this case too.

We conclude, therefore, that the law firm, having properly withdrawn from the representation of this client, may now initiate whatever court action is proper to obtain its fees. In view of the policy of avoiding *litigation* between lawyers and clients, or former clients, over fees (*see* EC 2-23), the law firm should make reasonable efforts to have the client pay without suit. Such efforts do not, however, require protracted delays, or the acceptance of non-binding promises by the former client, prior to bringing an action to collect fees.

Approved: April 29, 1980

Opinion No. 90

DR 5-103(A); EC 5-7; EC 2-23, Legal Ethics Committee Opinion No. 59—Assertion of Retaining Lien After Change of Counsel; Determination of Financial Inability of a Client to Pay Fees as an Exception to Retaining Lien

Synopsis

In determining whether to continue asserting a retaining lien on the files of a client who has changed counsel and who has failed to pay contracted for legal fees, a lawyer may rely on representations that his client is financially able to pay although he should give his client a full opportunity to explain his financial status. This holds true even though the transfer of the files to the new counsel may be useful or even essential. If the client has represented that he is able to pay, the attorney may continue to assert his lien.

Facts

The inquiring lawyer is a specialist in employment discrimination. Several months ago the Lawyer Referral & Information Service referred a client to him with a discrimination case. The case was pending before the Equal Employment Opportunity Commission ("EEOC") for an "informal resolution" conference. The client said that he had a continuing relationship with another law firm, that he had asked them to represent him in this case, and that they had declined. That firm subsequently confirmed this fact to the lawyer.

The lawyer told the client that the matter could be costly, and the client acknowledged this and insisted he could pay for the services. A retainer contract was negotiated and signed. The client made the first payment late, but not objectionably so. The lawyer's relations with his client were on the whole satisfactory. The lawyer prepared his client, talked to several potential witnesses, and appeared on behalf of his client in a full day's hearing before EEOC. The client never expressed any dissatisfaction with the lawyer's performance.

After the hearing, the lawyer gave the client specific instructions concerning information he would need before proceeding further, and the client promised to provide the information within a week. The lawyer then sent the client a bill.

The lawyer did not hear from the client for a month and a half even though he had twice sent him reminders. At that point he heard from the client through his former at-

torney ("new counsel") who said he had decided to take over the case at the client's request, and demanded the files immediately. The lawyer replied he had no intention of complying without a written discharge from the client and without first being paid for his services.

Shortly thereafter, the new counsel advised the lawyer that he had filed for bankruptcy on behalf of his client. At the same time the client assured the lawyer in writing that he would and could pay his bill though he did not say when. The lawyer has never received a notice of bankruptcy.

Subsequently, the client made a partial payment and demanded the files. The lawyer referred him to D.C. Bar Legal Ethics Opinion 59. The client admitted that he could and would pay the bill, and insisted that his naked promise was sufficient security. The lawyer disagreed.

The lawyer does not know whether the client and his new counsel would find the possession of the file useful or essential.

Analysis

In Opinion No. 59 the Committee dealt comprehensively with the propriety of an attorney asserting a retaining lien following a client's decision to change counsel, and set forth the following conclusions:

1. A lawyer may ethically assert a retaining lien by withholding his former client's file in order to secure payment of his earned fees, even if the assertion of the lien causes inconvenience to the client. By definition, the effectiveness of a retaining lien assumes that it will result in inconvenience.

2. An attorney has the right to assert a retaining lien even if the file is "necessary" for new counsel to act either as an advisor or as litigation counsel, except when (a) the client gives other security for payment of the fees; (b) the client is financially unable to pay the fees; or (c) the file is necessary to the defense of a serious criminal charge or to the protection of the client's personal liberty.

3. The lawyer's duty to avoid "foreseeable prejudice" of the rights of the client after the lawyer withdraws from a representation does not bar the assertion of a retaining lien, except in the situations described in the answer to the second question. The lawyer should assume the initiative, however, in seeking to avoid the need for actual invocation of the lien, and should ordinarily renounce the lien unless his legitimate financial interests clearly outweigh the adversely affected interests of his former client.

The Committee believes that Opinion 59 basically answers the lawyer's inquiry. The only new question the Committee perceives the inquiry may arise is whether under the paragraph 2(b) exception the lawyer has an obligation to determine whether the client is financially unable to pay the fees, which, if true, would deprive the lawyer of his right to assert his lien. The exception would seem to envisage an indigent client, and not only one who was indigent at the moment but whose indigency was likely to continue in the foreseeable future. In the present situation the client has assured the lawyer both orally and in writing that he is financially able to pay the fees. However, his representation is in conflict with the report from the new counsel that his client had filed for bankruptcy, which report would probably disable the client from preferring his former lawyer as a creditor.

Despite these ambiguous circumstances, the Committee does not believe that the lawyer has an obligation to investigate into his former client's bankruptcy or financial status. In our view it is sufficient if the lawyer gives the client an opportunity to explain his financial position. If thereupon the client continues to represent that he is able to pay, the lawyer is acting properly in continuing to assert his lien until such payment is made. Finally, contrary to the client's view, the client's "naked promise" is not a sufficient security to come within exception 2(a) above.

Inquiry No. 80-1-6
Approved: June 24, 1980

Opinion No. 91

DR 2-101; DR 2-110; DR 1-102(A)(4)—Preparation and Advertising of a Prepaid Legal Services Plan

Synopsis

A proposed prepaid legal services plan is misleading and therefore prohibited where it is advertised through a letter which omits material facts about the plan and which leaves a misimpression that the plan provides more services than it actually does. Advertisement of a flat fee for such a plan is *per se* prohibited by the Code. The plan's structure may also violate portions of the Code if it misleadingly appears to provide a wide variety of services, but actually provides few, or if it allows the attorney to withdraw from a representation in a manner inconsistent with Code provisions.

Opinion

A member of the bar proposes a novel approach to a "legal services plan" and asks the committee's opinion on its ethical propriety. The inquirer intends to conduct a mass mailing of two zip code areas in Washington to inform residents that they are eligible by virtue of the location of their residences for enrollment in a prepaid legal services plan. He characterizes the plan as being based on an "insurance concept," with enrollment limited to 300 families. He outlines the terms of the plan in his cover letter as follows:

I will (1) be available to you on an "on call" basis as your Counselor; (2) provide you up to three completed non-contested matters in any one-year period including, if necessary, investigation, research, written opinion, correspondence with adverse party or Counselor; negotiating settlement agreements, filing complaints or answers; (3) specifically handle personal matters pertaining to writing of wills, juvenile, small claims, landlord and tenant, traffic, consumer actions, real estate, and criminal (criminal matters will be handled only until other counsel can be retained at my option); *and* (4) *handle trial matters at three-fourths of my normal fee* for a total cost to you of $250.00 per year.

Attached to the letter is a sample retainer agreement which incorporates the terms mentioned in the letter, but which includes additional terms as well.

Some of those additional terms concern extra costs the client will have to bear. For example, Paragraph 5 of the retainer contract informs the client that he or she will have to pay any court costs related to filing of a complaint or answer. Paragraph 6 stipulates that the client will be charged for any "additional services in connection with any action taken...on the client's behalf after the complaint or answer is filed." The agreement doesn't explain what might be included under the "additional service" category.

Other terms indicate ways in which the attorney's responsibilities are limited. Paragraphs 7 and 8 make it clear that the services provided by the attorney for the $250.00 do not include any services beyond the filing of the original pleadings in the case. The price does not include any action at the trial stage beyond the filing of the complaint or answer, nor does it include any appeal of a decision of a court or administrative agency.

Moreover, Paragraph 9 gives the attorney the right to make arrangement for the case to be handled by another attorney for any number of reasons, and Paragraph 10 allows him to decline representation in cases involving personal injury, workman's compensation, medical malpractice, wrongful death, criminal or divorce cases. There are other clauses dealing with the right to renew, the right to cancel, and the effect of failure to renew.

The inquirer asks whether his proposal is ethically sound.

Discussion

The inquirer proposes to develop a prepaid legal services plan which would be restricted to individuals living within a specified zip code area. While this geographic format may represent a new and unusual way of developing a law practice, there is nothing in the Code of Professional Responsibility which would prevent the attorney from structuring his plan along these lines. Such a practice would be subject to the same ethical restraints as other forms of legal practice are, no more and no less. Moreover, there is nothing improper *per se* about the formation of a prepaid legal services plan. Innovative approaches and fresh ideas in this area may result in the availability of necessary low-cost legal services to individuals who could not previously afford to employ an attorney. This wider availability is a goal to which the profession is, and should be, committed. The committee encourages the development of new ap-

proaches to the provision of legal services, so long as those approaches conform to the general and accepted norms of ethical conduct designed to protect the public and the profession. Unfortunately, however, the plan proposed by this inquiry violates a number of fundamental ethical precepts and we are bound to conclude that such a plan is prohibited by the Code of Professional Responsibility.

The primary question that is raised by the inquirer's proposed plan involves the manner in which he intends to contact and obtain clients within those specified geographic areas. Only a few years ago, the mass mailing that he intends to use would have been *per se* forbidden. However, recent court decisions, most notably *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977) have initiated a new era in the realm of lawyer advertising.

A mass mailing arguably constitutes "solicitation" of business, but would not, as such, be regulated by the provision of the Code dealing with solicitation. That provision, DR 2-103(A), is limited to instances of "in-person" contact with non-lawyers, which this clearly is not.

Rather, we think that a mass mailing falls more properly in the category of attorney advertising and is subject to the restrictions of DR 2-101. This is a position that several courts have taken when confronted by a situation where attorneys have used general mailings to inform prospective clients of available services. "[T]he only significant difference between the letter in this case and the form of advertisement in *Bates* is that one was published in newspaper and the other by mailing letters to real estate agencies." *Kentucky Bar Ass'n* v. *Stuart and Thompson,* 568 S.W. 2d 933 (Ky. 1978); cf. *Ohralik* v. *Ohio State Bar Assn'n,* 436 U.S. 447 (1978).

DR 2-101 provides:

Publicity and Advertising

(A) A lawyer shall not knowingly make any representation about his or her ability, background or experience or that of the lawyer's partner or associate, or about the fee or any other aspect of a proposed professional engagement that is false, fraudulent, misleading or deceptive, and that might reasonably be expected to induce reliance by a member of the public.

Thus, attorneys, like our inquirer, who advertise their plans, are cautioned by the Code against making any representations about fees or other terms of the proposed retainer contract which might be misleading. DR 2-101(B) defined misleading statements to include:

...(2) omits to state any material fact necessary to make the statement, in light of all circumstances, not misleading;

(3) is intended or is likely to create an unjustified expectation.

We are concerned, under the circumstances, whether the inquirer's advertisement might tend to mislead the persons to whom it is directed. The letter conveys the impression that the consumer is purchasing "legal" insurance—that is, that he or she is paying $250.00 to protect against potentially much higher costs in the event that legal representation becomes necessary. In fact, the plan set forth in the attached agreement is closer to a retainer agreement than it is to an "insurance" plan. The terms of the agreement make it clear that the client will have to bear additional costs not mentioned in the cover letter, should he or she become involved in a legal dispute of any import.

Moreover, the cover letter omits to mention a number of the express exclusions set forth in the agreement. It does not inform the prospective client that the attorney offering the plan may decline representation for a wide variety of problems for which the client might otherwise expect help—for example, personal injury, workman's compensation, medical malpractice, criminal or divorce cases.

In effect, the inquirer's synopsis of the prepaid legal plan is incomplete and somewhat ambiguous. He states, at the end of the paragraph quoted above that the services to be rendered are available to the client "at a total cost to you of $250.00 per year." Unless the prospective client reads the attached contract carefully, he or she might expect that $250.00 represents the total cost that could be incurred under the plan for the entire year. It is clear that this is not the case. To the contrary, it is likely that any participant who had need of legal services would incur far greater costs when one considers the many limitations and exceptions that are part of the actual plan.

The manner in which the cover letter is worded may lead the consumer to "unjustified expectations" about the coverage provided by the proposed plan. The cover letter omits mention of many material elements of the plan which the consumer would need to make an informed choice about the worth of enrolling in the plan. While it may be true that the consumer might discover the additional terms by carefully reading the terms of the contract, we note that many of those persons receiving this advertisement will not be legally sophisticated. We think that the burden of making such an advertisement clear and unambiguous rests firmly with the attorney, and not with the prospective client.

The attorney's characterization of the plan as "based on an insurance concept" is another source of possible misunderstanding. The agreement appears to be, in actuality, more like a traditional retainer agreement than insurance plan. Members of the public might be led to believe that enrollment in the plan shields them from risk of high attorney's fees in the event of a serious legal problem. In fact, it does little more than guarantee the assistance of the inquirer in handling small matters, or in dealing with the initial stages of serious legal disputes.[1]

DR 2-101(B)(5) further defines a fraudulent or misleading statement to include "any statement or claim which relates to legal fees other than" those provided in six limited exceptions. The inquirer's mention in his letter of a $250.00 annual fee does not fall within any of those exceptions and is thus prohibited by the Code as *per se* misleading.

Because the proposed plan clearly violates several Code provisions regarding advertising and publicity, the committee need not at this time determine whether it also transgresses other ethical rules. In passing, however, we note that a program that is so structured to be misleading to the public might well constitute a violation of DR 1-102(A)(4) which forbids a lawyer from "[engaging] in conduct involving dishonesty, fraud, deceit or misrepresentation." There is also some question whether the provisions in the contract allowing the attorney to terminate representation through his own election in certain instances properly conforms to the requirements for withdrawal set out in DR 2-110. In short, the committee finds the proposed plan potentially deficient in a number of other aspects which implicate the structure of the plan itself. Thus, while the advertising scheme is sufficiently misleading to render the plan unethical, we would strongly encourage the inquirer to reconsider the underlying structure of the plan itself to insure that is strictly meets the standards of responsiblity and candor which the Code requires.

Conclusion

In conclusion, we hold that under DR 2-101 there is nothing unethical about the inquirer's proposal to develop a prepaid legal plan available to persons living in a limited geographical area, nor anything unethical with his advertising his plan through a mass mailing to individuals living in that area. However, we consider the materials he has provided to the committee to be ambiguous and misleading. The cover letter omits many of the material elements of the actual plan, and is unclear about the actual scope of representation and potential cost of services. We think that the inquirer must redraft his cover letter to properly reflect the limitations and exclusions in the plan and to make clear to the consumer what he or she will be buying. The inquirer may not advertise cost figures unless those figures fit within the exceptions expressly provided for in DR 2-101(B)(5). The inquirer should consider restructuring the terms of the plan to avoid misleading the public about the scope of the plan's coverage, and should eliminate any provisions for withdrawal from representation which would violate DR 2-110.

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[1]Notwithstanding the committee's view regarding the ethics of the inquirer's proposal, the committee expresses no opinion as to whether the inquirer's proposed legal services plan constitutes the business of insurance and whether it is subject to the District of Columbia insurance laws.

Opinion No. 92

DR 5-105; DR 4-101; DR 9-101(B) & (C)— Propriety of Private Attorneys Handling Municipal Cases on a *Pro Bono* Basis; Conflict of Interest; Preservation of Client Confidences and Secrets; Appearance of Impropriety

The Corporation Counsel of the District of Columbia has requested our opinion concerning the ethical propriety of a proposed program, modeled after one currently being used by the City of New York, in which private attorneys acting on a *pro bono* basis would assist the City in managing its severely crowded civil docket. Although the program would be very helpful in solving the work load problems now confronting the Office of the Corporation Counsel, the proposal raises potential ethical problems relating to conflicts of interest, preservation of client confidences and the appearance of impropriety. Despite these potential problems, the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York found attorney participation in the New York City program to be ethically permissible as long as certain safeguards were honored. We likewise find that, with the observance of appropriate safeguards, an attorney may ethically participate in the program proposed by the Corporation Counsel.

I. Facts

The Office of Corporation Counsel is charged by § 1-301 of the District of Columbia Code with handling all legal matters in which the District is involved, including both offensive and defensive civil litigation to which the City is a party. Because of inadequate staffing, the Office is currently suffering what the Corporation Counsel has termed "critical work loads" that cannot be managed adequately by its existing staff. In order to reduce the work load problem, the Corporation Counsel proposes to develop a program that has successfully been utilized by the City of New York to eliminate a portion of its backlog. Under the program, individuals in private practice would represent the District of Columbia on a *pro bono* basis in certain types of cases under the supervision of an Assistant Corporation Counsel.

The Corporation Counsel proposes to restrict the types of cases that would be included in the *pro bono* program. One of the significant considerations in selecting the types of cases to be included in the program was the desire to minimize the possibility that confidential City information would be disclosed to private attorneys. Initially at least, only the following categories of cases would be assigned to the *pro bono* attorneys participating in the program:

1. Lawsuits filed against the District of Columbia in which the plaintiff alleges that he or she has fallen on public space as the result of an alleged defect, such as a hole or broken concrete slab in the sidewalk. In these cases, the plaintiff ordinarily alleges personal injury as the result of the fall and seeks monetary damages against the District of Columbia.
2. Lawsuits filed against the District of Columbia as the result of an accident between a vehicle driven by the plaintiff and a vehicle owned and operated by the District of Columbia. These cases ordinarily allege negligence on the part of the District of Columbia driver and seek compensation for property damage and personal injury.
3. Lawsuits filed against the District of Columbia by prisoners who have been injured by other prisoners. In these lawsuits, the plaintiff ordinarily alleges that the injuries were proximately caused by the lack of adequate security in the District's institution at issue.
4. Lawsuits filed against the District of Columbia by an employee of the District of Columbia who alleges that his or her right to continuing employment or promotion have been violated. Frequently these cases are filed as Title VII discrimination suits.
5. Lawsuits which are filed by the District of Columbia against others for damages to District property as the result of a vehicular collision.

As the *pro bono* program progresses, consideration will be given to adding a sixth category of cases comprising lawsuits filed against the District of Columbia as the result of alleged police conduct, including allegations of false arrest, false imprisonment, malicious prosecution and assault.

A pool of attorneys would be developed by contacting members of the bar and partners at various law firms to determine whether they or their firms were willing to devote resources to the program. Participating attorneys, many of whom are likely to be younger law firm associates, would be given training sessions in which matters pertinent to municipal litigation would be stressed. Then appropriate cases would be assigned to the participating attorneys for their acceptance on a voluntary basis.

Under the New York program, participating attorneys, out of necessity, are given a high degree of autonomy in handling assigned cases. Nevertheless, the reported results of that program have been favorable. Because the District of Columbia's work load problems are somewhat less severe than those with which the city of New York is confronted, the present proposal contemplates more active supervision of cases assigned to participating attorneys. An Assistant Corporation Counsel would be assigned to work on each case in a supervisory capacity, and all substantive pleadings would be submitted for approval by the Corporation Counsel prior to filing. *See* D.C. Code § 1-301. Case abstracts would also be submitted to the Office of the Corporation Counsel prior to trials, pre-trial conferences and settlement conferences, thereby according Corporation Counsel staff attorneys the opportunity to participate in the formulation of strategy and to intervene where intervention was deemed to be warranted. In addition, all proposed settlements would have to be approved by the Office of Corporation Counsel.

Recognizing that potential ethical problems are posed by the contemplated program, the Corporation Counsel has asked this Committee to issue an opinion specifying the conditions under which private attorneys could participate in the program without violating any ethical prohibitions. The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, in its Opinion No. 394 (1978) (hereinafter the "New York Opinion"), concluded that compliance with five restrictions would render attorney participation in that program ethically permissible. We believe that similar, albeit somewhat different, safeguards are sufficient to permit attorney participation in the program proposed by the District of Columbia Corporation Counsel.

II. Pertinent Ethical Restrictions

The program proposed by the Corporation Counsel raises a variety of ethical issues that can arise when a participating attorney representing the city is or has been involved in another matter concerning the City. The most salient of these issues relate to the potential for conflicts of interest and are governed by Canon 5 of the District of Columbia Code of Professional Responsibility. In addition, private attorneys who represent the City and have access to City files may be in a position to make use of the City's "confidences" or "secrets" in a way that is proscribed by Canon 4. Finally, the program also poses a risk that participation by some attorneys in some circumstances will create an "appearance of impropriety" as that term is used in Canon 9.

A. *Conflicts of Interest*

Canon 5 of the District of Columbia Code of Professional Responsibility emphasizes that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." The Ethical Considerations accompanying Canon 5 elaborate on this general principle. EC 5-14 states:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15 does contemplate the representation of multiple clients with different or potentially differing interests in some circumstances, but cautions that "[a] lawyer should never represent in litigation multiple clients with differing interests, and there are few situations in which he would be justified

in representing in litigation multiple clients with potentially differing interests.'"[1]

Under the program proposed by the Corporation Counsel, if participating attorneys or their firms are involved in litigation or other matters directly affecting the City, the concerns addressed by Canon 5 may be raised. Participating attorneys and firms may well be asked to represent the City in one matter while they are in a position adverse to the City in connection with another matter. However, because the percentage of private practitioners and firms who may have dealing with the City at one time or another is quite large, their automatic exclusion from participation in the program would seriously undermine its effectiveness. Not only would the pool of available attorneys be reduced by the wholesale exclusion of attorneys and firms who, at the time of assignment, were involved in matters concerning the City, but a requirement that participating attorneys and firms withdraw from the program upon becoming involved in private matters involving the City would interfere with the continuity of the City's representation in assigned cases.

Against this backdrop, it is necessary to consider with more specificity the rules governing multiple representation. The circumstances under which private attorneys may simultaneously represent parties with divergent or potentially divergent interests are enumerated in DR 5-105, which provides:

> DR 5-105 *Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer.*
>
> (A) A lawyer shall decline proffered employment if the exercise of his independent judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, of if it would be likely to involve him in representing different interest, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a of if it would be likely to involve him in representing different interests, except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
>
> (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.
>
> [footnotes omitted.]

Multiple representation of both the City and a private client having dealings with the City raises a possibility of interference with the lawyer's independent judgment that can be sufficiently high to satisfy the "likelihood" standard of DR 5-105(A) and (B). Where an attorney determines that this is the case, DR 5-105(C) permits the attorney to participate in the proposed program notwithstanding his or her involvement in other matters affecting the City only if two requirements are met. First, it must be "obvious" that the lawyer can adequately represent both the interests of the city and his or her other clients. Second, each affected client must consent to the multiple representation after full disclosure.[2]

The Committee has already considered the meaning of the "obvious" requirement of DR 5-105(C). As we noted in Opinion No. 49, it is never literally "obvious" that multiple interests can be represented adequately by the same attorney. Therefore, in order to prevent the "obvious" requirement from entirely nullifying the consent provision of the Rule, we construed it to mean "that the [attorney concludes that the multiple] representation will be adequate to the purpose of the clients" after the attorney has determined the "nature of the representation" that the clients desire. *See also* Opinion No. 54. We believe that under the circumstances set forth by the Corporation Counsel in her inquiry, the "obvious" requirement is met and poses no barrier to the operation of the proposed program. This should not be taken to mean, however, that the "obvious" test can always be met simply by obtaining the informed consent of the affected clients.

The second requirement contained in DR 5-105(C) requires a participating attorney to obtain, after full disclosure, the consent of all parties whose interests might be affected by multiple representation. Ethical Consideration 5-16 emphasizes the need for full disclosure of the ways in which the independence of an attorney's judgment might be impaired, prior to obtaining the consent of the affected clients. This permits a client to make an informed election of multiple representation if such representation serves the client's particular needs or desires, knowing that he or she may be settling for something less than total independence of the attorney's judgment. In the present case, the consent requirement is satisfied if both the City and the participating attorney's private clients are fully advised by the attorney of the ways in which either's interests might be affected by the attorney's representation of the other. Moreover, because DR 5-105 (B) requires an attorney to withdraw from multiple employment once the attorney's judgment becomes impermissibly impaired, even if such impaired judgment was not foreseen when the employment was undertaken, the attorney should also disclose the fact that withdrawal might subsequently become necessary and should explain the effect that such withdrawal might have on the client's interests. The ways in which a client's interests can be adversely affected are not always apparent, and the attorney should take this into account when making the required disclosures.

It is apparent that the attorney must obtain the consent of affected clients whom he or she represents personally, but we believe that the consent of all affected clients represented by other lawyers in the participating attorney's firm must also be obtained. In essence, the Code treats clients as if they are represented by firms rather than by individual attorneys within a firm. Although DR 5-105(A) through (C) are directed toward individual attorneys, DR 5-105(D) imputes the disqualification of an individual attorney to the attorney's entire firm, thereby effectively treating the firm as the client's attorney. This imputation will be carried forward even if pending proposals to modify the District of Columbia Code of Professional Responsibility are adopted.[3] Accordingly, before a firm agrees to participate in the program or to accept a particular case on behalf of the City, it should make the required disclosures to all potentially affected clients and obtain the consent of those clients.

Firms should be able to utilize their normal conflict-of-interest procedures to obtain the necessary consents with only minor modifications designed to compensate for the broad range of interests that might be affected by the firm's representation of the City. For example, if a firm wished to participate in the program, it could send a standardized letter to all clients identified as having present or potential future dealings with the City, describing the program and explaining in general how the judgment of the firm's attorneys might or might not be affected by the firm's participation in the program. If no client objected to general participation by the firm in the program, the

[1] While the pertinent portions of Canon 5 are addressed most directly to simultaneous multiple representation, it is also possible that an attorney's judgment could be impaired as a result of past representation. The problems posed by past representation on the part of public employees are addressed by Canon 9, which is discussed below. Nonetheless, we believe that the obligations imposed on an attorney by Canon 5 arise whenever the attorney's judgment is likely to be impaired, whether by past, present, or anticipated future representation.

[2] The fact that DR 5-105 speaks in terms of "employment" does not, of course, preclude its application to an attorney who represents the City on a voluntary basis.

[3] The Board of Governors of the District of Columbia Bar has petitioned the District of Columbia Court of Appeals to modify DR 5-105(D) in a way that would permit avoidance of imputed disqualification in certain instances, primarily relating to former government employment. However, that proposal would not permit the avoidance of imputed disqualification based upon impairment of judgment or access to client confidences and secrets, an issue which is discussed below.

firm would then be free to represent the City in individual cases once it obtained consent, after more particularized disclosures, from the clients whose interests might be more directly affected in individual cases. Presumably, firms already utilize analogous disclosure and consent procedures every time they agree to represent a new client whose representation presents similar multiple representation issues under Canon 5. Under such an approach, standardized disclosure and consent procedures would suffice when the likelihood of impaired judgment was remote, but particularized disclosure and consent would be employed when the threat of impaired judgment was more immediate. As the firm accepted new clients whose interests could be affected by the firm's participation in the program, the new clients would be accorded the degree of disclosure appropriate in light of the likelihood of impaired judgment. Hopefully, such a disclosure and consent procedure would pose only minimal administrative burdens and would not deter firms from participating in the program if they were otherwise inclined to do so.

The City must also consent to any multiple representation occasioned by an attorney's participation in the proposed program, and the question of how the District of Columbia may give consent raises additional concerns. Because the interests of the City could seriously be undermined by the participation in the program of an attorney whose judgment was biased in favor of private clients, the consent of the City should be more than a mere formality. In addition, there are a wide variety of factors that can affect the desirability of multiple representation, including the consequences of failing to give consent in light of the City's work load. Because the consent of the City should be given only after a careful balancing of the competing "public interests" that the City, by definition, must represent, the question of who is authorized to give consent on behalf of the City becomes an important one.

There are older ethics opinions issued by the American Bar Association which hold that the public nature of governmental activities completely precludes a governmental entity from ever consenting to multiple representation where potential conflicts of interest are involved. ABA Formal Opinion No. 16 (1929) precluded governmental entities from consenting to such multiple representation, as did Formal Opinions No. 34 (1931) and 77 (1932). However, this does not appear to be the currently accepted rule. In its more recent Formal Opinion No. 306 (1962), the ABA seems to have adopted the view that governmental consent is effective if expressly or implicitly authorized by law. Consistent with Opinion No. 306, we believe that the issue of whether and how a municipality may give consent is more properly viewed as a question of law than a question of ethics. Accordingly, if the Corporation Counsel, as the City's chief law officer, determines that she or some other municipal officer or agency is empowered to give consent, we believe that legally effective consent will also be effective for the purpose of DR 5-105(C).[4]

As noted above, even when consent is obtained after full disclosure, it is apparent that withdrawal from multiple representation will be appropriate in some instances. *See* DR 5-105(B). Withdrawal is likely to be required when interests diverge more than was originally anticipated or where parties reconsider the wisdom of multiple representation after having had a taste of it. When withdrawal does appear to be appropriate, participating attorneys are ethically required to comply with the provisions of DR 2-110 governing the circumstances under which withdrawal is permitted and the precautions which must accompany withdrawal. In particular, DR 2-110(C)(5) precludes withdrawal unless the client knowingly and freely assents, and DR 2-110 (A)(2) requires an attorney to take reasonable steps to avoid foreseeable prejudice to his or her client that could result from withdrawal.

B. *Preservation of Client Confidences*

In the course of representing the City, participating attorneys may acquire nonpublic information which constitutes client "confidences" or "secrets" within the meaning of DR 4-101(A). Such information cannot generally be disclosed to third parties or used to the disadvantage of a client. *See* DR 4-101(B)(1) and (2).[5] As is the case with respect to impairment of an attorney's judgment, a client is typically viewed as being represented by an entire firm rather than a particular attorney for the purposes of applying restrictions that relate to client confidences and secrets. Accordingly, when one attorney in a firm has knowlege of confidences and secrets, that knowledge is imputed to the entire firm. Where the danger of disclosure or misuse of confidences and secrets is high, courts have tended to prohibit multiple representation. *See Trone* v. *Smith*, ____ F.2d ____ (9th Cir., June 23, 1980); *Westinghouse Electric Corp.* v. *Kerr McGee*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). However, where the attorney with knowledge of confidences and secrets can be effectively screened from participation in other related matters being handled by the firm, multiple representation has not been precluded. *See Armstrong* v. *McAlpin*, ____ F.2d ____ (2d Cir., June 20, 1980) (en banc).

In addressing this issue, the New York Opinion imposed an obligation on both the City and the participating attorney to avoid the assignment of matters which are likely to involve access to files or discussions with City employees that might provide confidential information to the participating attorney. The New York Opinion also imposed an obligation on participating attorneys to withdraw if it became apparent that access to such information would be required. We agree that these obligations should accompany participation in the proposed program, and note that the Corporation Counsel has selected for inclusion in the program only those categories of cases in which disclosure of confidential information will be unlikely.[6]

C. *Appearance of Impropriety*

To the extent that the proposed program would permit private attorneys to both sue and represent the District of Columbia, it creates a potential appearance-of-impropriety problem. Canon 9 broadly asserts that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety," and the Ethical Considerations accompanying that Canon indicate that its purpose is to promote public confidence in lawyers and the legal system. These general concerns are reduced to two Disciplinary Rules which directly bear upon the present situation. DR 9-101 states in pertinent part:

> DR 9-101. *Avoiding Even the Appearance of Impropriety*
>
> ***
>
> (B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.
>
> (C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official.

Although Canon 9 of the District of Columbia Code of Professional Responsibility is presently the subject of proposals for major revision, all of the proposals for modification retain the substance of these two provisions. Accordingly, the appearance-of-impropriety problems attendant to the proposed program require, at the very least, that these two provisions be complied with.

The DR 9-101(B) prohibition on accepting private employment in a matter in which an attorney had substantial responsibility as a public employee is not technically applicable here because participating attorneys are private volunteers rather than public em-

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[4]This is the position adopted in the New York Opinion, where the Corporation Counsel concluded that the Mayor had the authority to give consent on the part of the City, which presumably could be delegated to the Corporation Counsel.

[5]Of course it is equally true that the confidences and secrets of private clients may not be disclosed to the City or used to the disadvantage of private clients.

[6]The problem of access to information which is not publicly available is also present in the "revolving door" situation, where former government employees handle private matters involving the government. As noted below, we believe that the Canon 9 concerns directed to former public employees should also apply to attorneys participating in the program proposed by the Corporation Counsel.

ployees. We nevertheless believe that the provision should apply with full force in the present situation because the considerations on which the Rule is based are fully applicable. If a participating attorney were to accept private employment in the same matter in which he or she had formerly represented the City, the appearance of impropriety would not be attenuated by the fact that the participating attorney had not been paid for representing the City. Therefore, in the present context, participating attorneys should be regarded as public employees for the purpose of DR 9-101(B).[7]

When an individual attorney is disqualified under Canon 9, the degree to which that disqualification should be imputed to the attorney's firm is properly governed by the Code provisions dealing with disqualification based upon former government employment. As noted above, under the current Code as written, DR 5-105(D) imputes all individual disqualifications to the disqualified attorney's firm. However, in Formal Opinion No. 342 (1976), the Ethics Committee of the American Bar Association ruled that in the absence of an appearance of significant impropriety a governmental agency could waive the imputation of disqualification to a disqualified attorney's firm if the disqualified attorney were adequately screened from participation in the matter at issue. In addition, the Board of Governors of the District of Columbia Bar has petitioned the District of Columbia Court of Appeals to modify DR 5-105(D) and Canon 9 of the District of Columbia Code of Professional Responsibility in a way that would permit the imputation of disqualification to be avoided after appropriate screening and/or waiver procedures. While the Court has not yet taken final action on this petition, it did issue an April 17, 1980 proposed order suggesting that it will shortly adopt some procedure permitting the avoidance of imputed disqualification. Accordingly, it does not appear that individual disqualification based solely upon Canon 9 will automatically be imputed to the disqualified attorney's firm. Any conclusion on this point might, however, require reexamination after the District of Columbia Court of Appeals acts upon the pending petition.

DR 9-101(C) prohibits attorneys from stating or implying that they are able to influence a public official improperly or on irrelevant grounds. *See also* DR 8-101(A). In the context of the present inquiry, this not only prohibits participating attorneys from affirmatively suggesting to their clients that they are able to exert improper influence over City officials, but it also imposes a duty on those attorneys to correct any misimpressions that their private client might have in this regard. Attorneys may choose to participate in the proposed program for a variety of reasons. Participation would provide a means by which an attorney could satisfy his or her obligation to provide *pro bono* legal services and to participate in programs designed to improve the legal system. *See* EC 2-25; EC 8-1. In addition, law firms might wish to participate in order to give their younger associates litigation experience. However, to the extent that lawyers wish to participate in order to secure actual or apparant advantages for their private clients with matters involving the City, such participation is ethically improper, and attorneys have an obligation to guard against the possibility that private clients are retaining them in the hope of obtaining such advantages.

In addition to the prohibitions contained in DR 9-101(B) and (C), we believe that one other safeguard is necessary to minimize any appearance of impropriety that might otherwise accompany participation in the proposed program. There is little likelihood that serious public objection would result if a participating attorney were representing the Zoning Commission in a contract dispute at the same time that he or she was prosecuting an appeal from a Public Service Commission ruling. However, if the attorney were both suing and representing the Zoning Commission at the same time, the appearance-of-impropriety problems would be much more serious. Accordingly, we believe that it would be inappropriate for a participating attorney or firm to represent the City in a matter involving any particular agency at the same time that the attorney or firm was handling a private matter involving that same agency or another matter that was or appeared to be closely related. This additional safeguard should, in most cases, be sufficient to prevent any appearance-of-impropriety problems.[8]

Although we have proposed a safeguard which is not contained in any of the Disciplinary Rules that accompany Canon 9, this Committee has previously concluded that the Canon 9 Disciplinary Rules were not intended to be an exhaustive list of circumstances in which professional conduct might appear to be improper. *See* Opinion No. 48. Ethical Consideration 9-2 seems to preclude any view of the Canon 9 Disciplinary Rules as exhaustive stating that "[w]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." Accordingly, we believe that the Canon itself, as well as the pertinent Ethical Considerations, indicate that inclusion of the additional safeguard that we have proposed would be prudent. Regardless of whether disciplinary action can ever properly be based upon the violation of an ethical consideration alone, we believe that a government-designed program, such as the one proposed by the Corporation Counsel, should strive to satisfy the aspirational Ethical Considerations, as well as the mandatory Disciplinary Rules of the Code of Professional Responsibility, and we note that the Corporation Counsel has agreed to this additional safeguard.

Conclusion and Guidelines

We believe that attorneys may ethically participate in the program proposed by the Corporation Counsel, under which they would help to solve her Office's critical work load problems by representing the City on a *pro bono* basis, provided that the following safeguards are complied with:

1. The participating attorney or firm obtains the consent of the City and the private clients of the firm whose interests could be affected after full disclosure of the ways in which the independent professional judgment of the attorney might be affected;
2. The attorney or firm does not disclose or misuse the confidences or secrets of either the City or private clients, and both the City and the participating attorney or firm endeavor to limit the attorney's access to City information so that it is no broader than necessary to properly represent the City;
3. The attorney or firm does not represent both the City and a private citizen in connection with the same matter if the attorney or firm has had substantial responsibility for the matter;
4. The attorney or firm does not simultaneously represent a City agency and a private client in connection with a matter involving that agency or in connection with another closely related matter;
5. The attorney or firm guards against the possibility that private clients believe that the attorney or firm is able to improperly influence a public official as a result of participation in the proposed program; and
6. If it appears that any of these safeguards or other provisions of the Code of Professional Responsibility are likely to be violated once representation of the City or a private client is undertaken, the participating attorney withdraws from such representation when necessary to prevent a Code violation, taking care to minimize any prejudice to clients that can result from such withdrawal.

These safeguards should facilitate the effective and ethical operation of the program proposed by the Corporation Counsel.

Inquiry No. 8-5-20
September 30, 1980

[7]The meanings of the terms "matter" and "substantial responsibility" as used in DR 9-101 (B) are difficult to ascertain or state with any precision. The terms have previously been construed by this Committee in Opinions No. 16, 26, 82 and 84. In addition, the American Bar Association, in Formal Opinion 342 (1976) stated:

> The term ["matter"] seems to contemplate a discrete and isolated transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issues of fact involving the same parties and the same situation or conduct is the same matter.

[8]The New York Opinion adopted the same safeguard, although it did so as an incident to its ruling on the conflict-of-interest problems posed by the proposed program rather than relating it to the appearance-of-impropriety problems.

Opinion No. 93

DR 3-101(A); DR 3-102; DR 3-103; EC 3-6; DR 5-107(B); DR 5-107(C)—Law Firms Offering The Services Of Professionals Other Than Lawyers

In this Committee's Opinion 87 (1980), we addressed three questions that had been put to us concerning a professional corporation from another jurisdiction offering legal services in the District of Columbia—questions having to do with the status of the persons whose names were included in the corporate name of the firm, its use of the title "legal clinic," and its accepting payment of fees on an installment plan based on credit cards—but we deferred for separate treatment a fourth question raised by the inquirer about the same firm. In this opinion we turn to the question so deferred: whether it is ethically proper for a lawyer, law firm or professional corporation, while engaging in the practice of law, also to offer and furnish services of other professionals, such as (in this case) psychologists, social workers and family counselors.

The circumstances giving rise to the inquiry are set out in Opinion 87. The question here to be addressed was prompted by the fact that the brochure of the "legal clinic" in question lists, among other "special services" that it offers:[1]

Family and Individual Counseling:

Licensed psychologists, social workers and family counselors are available at the Clinic to assist clients through the emotional crisis of divorce, separation, family conflicts, and problems with growing children, as well as drug and alcohol abuse problems. Diagnostic testing and evaluation services are also available.

It appears that the services so described may be furnished to clients of the firm not merely in connection with legal services provided to the same clients, but also independently of any legal services.

For reasons to be explained, we believe that the ethical restrictions on collaborative enterprises involving both lawyers and non-lawyers are concerned only with preventing improper lay involvement in the professional activities of lawyers, and are not addressed to activities that do not constitute the practice of law, even if lawyers are in some manner involved in such activities. We therefore conclude that so long as a law firm is so organized and run that non-lawyers do not control the activities of lawyers in the practice of law, or share in fees generated from such practice, and so long as the non-lawyers do not engage in activities connected with the practice of law which it would be unethical for the lawyers to engage in, there is no ethical inhibition on a law firm's offering or furnishing non-legal services such as those here in question.

Since the inquiry came to this Committee not from the firm concerned, or any lawyer connected with it, but rather from a third party who simply submitted to the Committee the firm's brochure, our knowledge of the facts of the case is limited to what is shown or may be inferred from the brochure. The passage from that document quoted above suggests that the services of psychologists, social workers and family counselors are principally offered in connection with the legal services that the clinic also provides (as in domestic relations and juvenile cases), but are not necessarily limited to cases where legal services are also involved. Thus, for example, the proffered "diagnostic testing and evaluation services" would not appear to be so linked, but might well be furnished to clients who required no legal help or advice at all. What the firm in question is doing thus appears to reflect, at least in part, the recent general trend toward lawyers making use of the skills of various groups of non-lawyers (such as economists, accountants, computer specialists and paralegals), but with the added feature that some of the services of the non-legal specialists may be offered directly to the clients, without necessarily being intertwined with the provision of legal services to the same client. There can be no doubt that the provision of such services by a law firm could be of substantial benefit to the firm's clients. The question is, what ethical limitations apply to such a firm's providing them.

The Canons that are the source of the ethical strictures that apply to enterprises involving both lawyers and laymen are Canon 3, whose command, in very general terms, is that "a lawyer should assist in preventing the unauthorized practice of law," and Canon 5, which states with equal generality that "a lawyer should exercise independent professional judgment on behalf of a client." Canon 3 is implemented by three Disciplinary Rules pertinent to the subject here addressed, respectively prohibiting lawyers from aiding non-lawyers in engaging in the unauthorized practice of law (DR 3-101(A)), dividing legal fees with non-lawyers (DR 3-102), and forming partnerships with non-lawyers for activities which include the practice of law (DR 3-103). The applicable Disciplinary Rules under the other Canon prescribe that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering...legal services" (DR 5-107(B)), and lay down certain limitations on a lawyer practicing "in the form of a professional corporation or association authorized to practice law for a profit" together with non-lawyers (DR 5-107 (C)).

Although the emphases of these two Canons differ somewhat—the first focusing on a lawyer's helping a non-lawyer to engage in unlicensed practice of law, and the other on interference by a non-lawyer in a lawyer's exercise of professional judgment—they reinforce each other and, taken together, present a clear and coherent pattern of restrictions on collaboration between lawyers and non-lawyers. That pattern may be comprehensively traced as follows:

(1) The services to be provided by non-lawyers must be non-legal services; or, if they are legal services, then they must be performed under the supervision of a lawyer, and must not include any activities that would be ethically impermissible if performed directly by a lawyer.

(2) The non-lawyers involved in the enterprise must not direct or regulate the exercise of the professional judgment of lawyers in the performance of legal services.

(3) The non-lawyers must not share in fees paid for legal services, though they may receive fees for non-legal services performed by them.

(4) As respects the form of the enterprise, reflecting requirements (2) and (3), just described, legal services must not be performed by a partnership which includes both lawyers and non-lawyers, or by a corporation in which non-lawyers have the power to direct the performance of legal services, or to profit from them.

It may be observed that none of these prohibitions is concerned with purely non-legal activities; rather, all of them are addressed to situations where both lawyer and non-lawyer participate, in one way or another, in activities that constitute the practice of law, at least when performed by a lawyer. The several individual prohibitions vary according to who is helping whom to do what in connection with the practice of law.

Thus, insofar as the prohibitions focus on the lawyer's furnishing assistance to the non-lawyer, they provide (in DR 3-101(A) and its predecessor Canon 47) that a lawyer may not offer specific assistance to a non-lawyer engaging independently in activities that constitute the unauthorized practice of law, *see* ABA Formal Opinion 68 (1932) (lawyer furnishing his letterhead and signature to a client for its collection letters); ABA Formal Opinion 41 (1931) (lawyer lending his name to a bank which drew wills and trust agreements for third parties); ABA Formal Opinion 31 (1931) (lawyer assisting a corporation which prepared articles of incorporation, etc., for other corporations); ABA Informal Opinion 799 (1965) (lawyer's name, together with designation as a member of the bar, on a collection agency's letterhead); ABA Informal Opinion 1254 (1972) (will drafting for individuals at the behest of a church stewardship planning department); and also that the lawyer may not her/himself become an instrument for such practice by non-lawyers, by allowing a non-lawyer to exercise supervisory responsibility over the lawyer's activities *qua* lawyer, *see* ABA Formal Opinion 41, *supra*; ABA Formal Opinion 35 (1931) (lawyer accepting employment from a collection agency which used laymen to institute col-

[1]The captions under which the other "special services" listed in the brochure are described are: "Free consultation," "Convenient office hours," "Installment payment plans," "Small claims," "Traffic tickets," and "Purchase of home."

lection suits). The latter stricture is also reinforced by DR 5-107(B), prohibiting a lawyer from allowing a person who recommends, employs or pay him to "direct or regulate his professional judgment," and DR 5-107 (C)(3), prohibiting a lawyer to practice in corporate form if "a non-lawyer has the right to direct or control the professional judgment of a lawyer." *See* ABA Informal Opinion 1288 (1974) (preparation of wills for church members, with fee being donated directly to the church). The prohibitions of DR 3-102 on a lawyer's sharing legal fees with laymen may also be understood to rest on concern with lay control of the lawyer's professional activities.

Where the direction in which the assistance flows is reversed—so that it is the non-lawyer who is aiding the lawyer—different, and more limited, restrictions apply. Of course lawyers have long used, and in modern times are increasingly making use of, non-lawyers to assist them in the practice of law. This is specifically recognized in EC 3-6:

> A lawyer often delegates tasks to clerks, secretaries, and other laypersons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

Although it is thus not inherently improper as an ethical matter for lawyers to use non-lawyers to assist them in the practice of law, the propriety depends on two conditions: the lawyer must furnish adequate supervision of their work, so as to assure that the work is performed with due skill and diligence; and the non-lawyer may not, in assisting the lawyer's practice, do anything that, if done by the lawyer, would be unethical. *See* ABA Formal Opinion 316 (1967):

> A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scriveners, nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings as part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible for it to the client. In other words, we do not limit the kind of assistants the lawyer can acquire in any way to persons who are admitted to the Bar, so long as the nonlawyers do not do things that lawyers may not do or do the things that lawyers only may do.

See also ABA Formal Opinion 225 (1941) (former Canon 35 prohibits an attorney's participation in a collection agency; danger of impermissible solicitation); ABA Formal Opinion 35, *supra* (same).

The ethical limitations on the *form* of enterprises engaged in the practice of law and involving both lawyers and non-lawyers reflect, and implement, the more fundamental prohibitions on direct lay control of the professional judgment of lawyers, by reason of formal authority; or on indirect lay control by reason of ownership interest of fee-sharing. Thus, a lawyer may not, under DR 3-103, have a non-lawyer as a partner in an enterprise which involves the practice of law (even though it may involve other activities as well); nor, under DR 5-107(C), practice in corporate form if a non-lawyer has an interest or a position in the corporation comparable to that of a partner in a partnership.

All of these prohibitions appear, from the most natural reading of their texts and from the ethics committee decisions interpreting them, to be concerned with enterprises involving both lawyers and laymen only insofar as the activities involved related to the practice of law. They would have potential applicability to the services of psychologists, social workers and family counselors offered by the legal clinic with which the present inquiry is concerned only insofar as those services, or the persons furnishing them, were intertwined with the provision of legal services. But as we have mentioned, it appears that the services of these non-lawyer professionals may also be furnished quite independently of legal services. The question remaining to be considered, therefore, is whether the provisions of the Code can somehow be read to limit the provision of such non-legal services by law firms. Stated in more fundamental terms, the question is whether the fact that lawyers are involved in an enterprise that furnishes such non-legal services as well as legal services raises problems of an ethical dimension.

With a single exception shortly to be discussed, there appears to be no decisional authority directly on point. There is clear enough authority to the effect that there is no ethical inhibition on a lawyer engaging in activities not involving the practice of law, even though closely related thereto, *see, e.g.*, ABA Informal Opinion 1445 (1980) (lawyers and economists participating in an organization providing economic and economic-related analyses to lawyers); ABA Formal Opinion 269 (1945) (lawyer engaging as an accountant in tax practice); and in at least one instance the ABA committee has dealt with a situation where both the lawyer and an employee were offering non-legal services (social work counseling) along with the lawyer's services of a legal nature relating to divorces, ABA Informal Opinion 1437 (1979); although the committee was there addressing the advertising aspects of the operation, it evidently perceived no problem in the inherent possibility that clients might have consulted the firm solely for non-legal services.

The single decision where the issue has been explicitly addressed appears to be this Committee's Opinion 10 (1975), where the question to be decided was whether a lawyer was ethically restricted from submitting to a government agency a competitive bid for the performance of contracts which called for the skills both of lawyers and of persons in other occupations. It appeared in that case that the activities of the lawyers and the non-lawyers would be quite distinct rather than, as here, partly intertwined. Addressing only the three Disciplinary Rules under Canon 3, we observed:

> These Disciplinary Rules do not prohibit all association of lawyers and nonlawyers in projects which call for both legal and other skills. Rather, they require that where identifiable aspects of such projects fall within a lawyer's professional ken, so as to constitute the practice of law, the lawyer's professional responsiblity for those aspects of the work should not be shared in specific respects with laymen.

We concluded in Opinion 10 that the work there proposed to be performed under government contract would present no ethical problem so long as three conditions, corresponding to the three Disciplinary Rules under Canon 3, were met:[2]

> (1) the services to be provided by nonlawyers are non-legal services; (2) to the extent that nonlawyers receive a portion of the fees to be paid, that portion pertains only to non-legal portions of the work performed; and (3) the legal services are not to be performed by a partnership which includes both lawyers and nonlawyers.

We have set out above a somewhat more comprehensive formulation of the restrictions on enterprises involving both legal and non-legal activities, taking into account the Disciplinary Rules under Canon 5 as well as those under Canon 3, and dealing with some of the variations in the ways that laymen may be involved in lawyer's activities. That formulation does not affect the conclusion we reached in Opinion 10 on the issue here before us, however, which still seems sound. There appears to be no substantial reason why a lawyer, simply by reason of being a lawyer, should have some special ethical responsibility with respect to purely non-legal work performed by non-lawyers with whom the lawyer is associated.

There are three lights in which the question may be viewed so as to cast at least some shadow of a doubt. First, it might be asserted that there is a problem presented by a lawyer's taking responsibility for the competence of the work of a professional in a field in which the lawyer her/himself has no competence. There is a problem in a sense, of course, if the work is incompetently performed. However, we see no reason for giving that problem an ethical dimension solely because the lawyer is involved. This is a matter as to which the ethical rules of other professions (which, for instance, might prohibit members of a particular profession from submitting to direction by non-members of

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[2]The same inquiry appears to have been addressed by the ABA's ethics committee, and answered to the same effect but with less elaborate analysis, in ABA Informal Opinion 1343 (1976).

that profession), as well as the general law governing vicarious liability of an employer for the incompetence of his employee, should suffice to protect the interests of clients and the public.

Second, it might be thought that the fact that the other professional is employed by a lawyer will present a risk of inducing special expectations on the part of clients of the other professional as to the quality of the services to be rendered by that professional, so as to impose some special degree of responsibility on the lawyer. We conclude, however, that any such expectation would be without a reasonable foundation, and so would not provide any basis for special ethical responsibilities for the lawyer.

Finally, there is a possible question as to whether the lawyer might make referrals of his/her clients to the other professionals in question, without disclosing the lawyer's own financial interest in the other's services. If this were to occur, there might indeed be an ethical problem; but we do not believe that there is in the mere fact of the employment relationship an inherent risk of such deception, so as to warrant an across-the-board ethical stricture; indeed, at least in circumstances like those of the legal clinic which is the subject of the instant inquiry, it should be perfectly apparent to any potential client that the lawyer proprietors of the clinic do have a financial interest in the services performed by their non-legal employees.

We thus conclude that there is not in the present Code of Professional Responsibility any ethical restriction on a law firm offering to clients the services of professionals other than lawyers except when the services, or the professionals offering them, are enmeshed in the practice of law in one of the ways specifically prohibited by the Disciplinary Rules under Canons 3 and 5, described above.

Inquiry No. 78-2-2
December 24, 1980

Opinion No. 94

DR 5-105; DR 4-101; DR 3-102 and 103— Propriety of In-House Counsel Performing Legal Services for Related Organization; Conflict of Interest; Preservation of Client Confidences and Secrets; Unauthorized Practice of Law

The General Counsel of a national trade association ("Association") asks whether, consistent with the Code of Professional Responsibility, his office may (1) provide legal services to a related educational association ("Educational Council") and (2) accept, for such services, fees that would accrue to the benefit of the Association. We answer both inquiries affirmatively, with the conditions set forth herein.

I. Facts

The Association is a national trade association representing approximately 150,000 members through 1000 affiliated state and local associations. The Educational Council runs training courses for persons in the profession which the Association seeks to represent. The two organizations are related in several other respects. One officer of the Association is an *ex officio* member of the Educational Council's Board of Trustees. The Association promotes the Educational Council's courses by accepting completion of the courses as one means of fulfilling the educational requirement necessary to maintain active membership in the Association. The organizations share the same premises.

The Association has an in-house counsel's office; the Educational Council does not. The organizations would like to make the Association's attorneys available to provide legal services to the Educational Council. The general counsel states that both organizations would understand that this relationship would continue only so long as the organizations do not have differing interests and the attorneys are able to maintain independent judgment on behalf of both organizations. Differing interests would be immediately made known to the organizations when discovered by the attorneys. At that point, the attorneys would represent the Association and would withdraw from the representation of the Educational Council. Professional fees for services provided would be established by the general counsel but would utlimately be at the disposal of the Association's Board of Trustees.

II. Analysis

A. *Dual Representation*

Because the attorneys here are employees of the Association, in every instance in which they would render services to the Educational Council, they would be, for analytical purposes, engaging in a multiple representation—even if no services relating to the matter in question are actually provided to the Association and even if the Association's interests are not involved in the representation.

Canon 5 of the Code of Professional Responsibility states that "A lawyer should exercise independent professional judgment on behalf of a client." The relevant Disciplinary Rule, DR 5-105(A) provides:

> A lawyer should decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the profferred employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

The same standard applies to continuing multiple employment, under DR 5-105(B).

Pursuant to the provisions of DR 5-105 (C), the clients may consent to a dual representation (1) after full disclosure by the attorney of the possible effect of the dual representation on the exercise of independent professional judgment on behalf of each client (2) if it is obvious that the lawyer can adequately represent both clients. We have interpreted the latter provision to mean that the lawyer must believe that "the representation will be adequate to the purposes of the clients in light of the understanding of the representation that is necessarily implied by each client's consent to the dual representation after disclosure to each client of how the duality of the representation will affect the lawyer's performance." Opinion No. 49, Legal Ethics Committee of the District of Columbia Bar.

Thus, in the first instance, the general counsel must determine whether, in light of the services that he and his staff expect to render, the interests of the Association and the Educational Council would be likely to differ and whether the attorney's independent professional judgment is likely to be adversely affected. Although the general counsel says that his office would perform only those services as to which unimpaired independent professional judgment could be exercised and would not represent the Educational Council if "differing interests are present," in our view, in the circumstances described, it is possible that interests will differ and that professional judgment will be affected, however slightly, in many instances. In order to proceed with the dual representation when interests differ, therefore, both clients' consent to the joint representation should be sought, after full disclosure, as set forth in Opinion 68 of this Committee:

> [F]ull disclosure requires an attorney to call the possible problem of impaired judgment—not simply the underlying facts—to the attention of his or her client, insofar as such a possibility is reasonably foreseeable.

Thus, the general counsel must advise each client, with reasonable particularity, of the ways in which the interests of the two clients may differ and how the attorneys' judgment may be affected. If the lawyer does not believe that he can adequately serve both clients' interests, he may not proceed with the representation even if both clients have consented.

A similar assessment by the lawyer must be made with every new engagement. He must determine whether there are differing interests. If there are, he must determine that he can adequately represent each client; he must disclose the differing interests and the factual basis of the possibility of impaired judgment; and he must obtain each client's consent.

B. *Preservation of Client Confidences*

In the course of representing both the Association and the Educational Council, the general counsel's office, which is already familiar with the Association's activities, is likely to become similarly familiar with the Educational Council's practices, policies, knowledge, information, etc. Some of this information may include "confidences" and "secrets," within the meaning of DR 4-101(A), that cannot generally be disclosed

without the client's consent and which can never be used to the disadvantage of the client. DR 4-101(B)(1) and (2). *See T.C. Theatre* v. *Warner Bros. Pictures,* 113 F.Supp. 265, 268-69 (S.D.N.Y. 1953).

In the ordinary situation, where independent counsel undertakes to represent two different parties, counsel must seek each party's consent to disclosure to the other of information which would otherwise be protected. Here, because the attorney is an employee of one of the two clients, the attorney must obtain in advance either the Educational Council's agreement that any information it shares with its attorney may be shared with the Association itself, or the Association's agreement that he is not required, by virtue of his employment by the Association, to transmit to the Association the secrets and confidences of the Educational Council.

C. *Withdrawal From Representation*

The general counsel posits that both the Association and the Educational Council agree that if his office discovers that the interests of the Association and the Educational Council differ, his office would withdraw from further representation of the Educational Council, but would continue to represent the Association. As has already been noted, the mere advent or appearance of differing interests alone does not require the abandonment of a dual representation. Such a representation may continue with consent after full disclosure unless the attorney determines that, in light of such differences, he cannot adequately represent both clients.

At that point, however, the attorney must determine whether it is proper to continue in the representation of either client. That determination will rest, in part, on the extent to which the attorney's duty to maintain the confidences of a client is implicated. The attorney's obligation to maintain the confidences and secrets of a client continues after termination of a representation. It may not be possible, in every instance, to continue the representation of the Association without risk that the confidences and secrets of the Educational Council will be utilized or revealed. ABA Formal Opinion 161 (1936); ABA Formal Opinion 154 (1936). *See Also* Opinion No. 63, Legal Ethics Committee of the District of Columbia Bar. As EC 5-20 suggests, for example, if the attorney has acted as mediator or negotiator for the two clients, he should not thereafter represent either party in a dispute deriving therefrom.

The Educational Council may, of course, consent to the use of its secrets and confidences by the attorney in his continued representation of the Association. Such consent may be obtained by the attorney in advance of the dual representation. It may be difficult, however, for the Educational Council to be adequately informed of the likely consequences of disclosure of confidences and secrets before it has even shared the confidences and secrets with counsel and before the joint representation has begun. *See* Opinion No. 49, Legal Ethics Committee of the District of Columbia Bar; *but see* ABA Informal Opinion 1323. If the circumstances or context in which consent was given change by the time that the dual representation is dissolved, so that the Educational Council can be said to have consented without an adequate understanding of the consequences of consent, the attorney will be obligated to obtain new consent in light of the altered circumstances. Thus, under certain conditions the Educational Council may be able to prevent its former lawyers from disclosing or using confidences or secrets at the time the attorney-client relationship is terminated. For this reason, it may not, in fact, be possible for the general counsel's office always to follow the course he proposes. Consequently, before consenting to the proposed relationship, the Association itself must be informed that there may be matters as to which the general counsel's office would have to withdraw from the representation of the Association.

D. *Payment of Fees*

The more unique question posed by this inquiry is under what circumstances, if any, the counsel's office of one organization may furnish legal services, for a fee, to another organization. On its face, the proposed arrangement appears to run afoul of Canon 3. DR 3-102 prohibits attorneys from sharing legal fees with non-lawyers and DR 3-103 prohibits the formation of a partnership with non-lawyers where part of its activities consists of the practice of law. These prohibitions are based on a concern for the independence of the attorney's professional judgment. EC 3-3 notes that the "Disciplinary Rules protect the public in that they prohibit a lawyer...from acting in cases of divided loyalities, and from submitting to the control of others in the exercise of his judgment." Thus, ABA Informal Opinion 1212 (1972) states that "[t]he relationships between the lawyer and the [client] should be direct and personal, and any compensation to be paid...should be agreed upon with, and paid to, the lawyer himself."

The issue was addressed in ABA Informal Opinion 973 (1967), in response to an inquiry whether an attorney employed by a corporation could render legal services to "related corporations" for which the attorney's corporation would charge a reasonable fee. The Committee found that, in the absence of substantial identity of ownership which would render the corporations *alter egos* of one another, the proposed arrangement posed several problems under the former ABA Canons. Nevertheless, the ABA Committee found the proposed arrangement permissible, with full disclosure and consent to certain restrictions. First, the ABA Committee determined that the former Canons required an attorney to be loyal to his client, without regard to who pays the attorney's salary. The attorney must have a direct and personal relationship with the client and his advice to the client must be rendered in the client's interest. We express a similar concern in our discussion and conclusion in Part A, *supra.* Second, the ABA Committee stated that the attorney must preserve inviolate the confidences of the related corporation, regardless of his employer's interest in knowing such confidences. We deal with this question in Part B, *supra.*

Having resolved the substantive ethical questions, the ABA Committee proceeded to consider whether the proposed arrangement was an unauthorized practice of law. Although the former Canons differ somewhat from DR 3-101-103, both prohibit the "exploitation" of a lawyer's professional services by a "lay agency, personal or corporate"[1] and, generally, the "unauthorized practice of law by any lay agency, personal or corporate."[2] Applying these prohibitions, the Committee reasoned that if the attorney's employer did not employ him "for the basic purpose" of supplying his professional services to other corporations and if the attorney could be retained directly by the related corporation with a *pro rata* reduction in salary based upon the portion of his time spent servicing the related corporation, violation of the Canons could be avoided.

Our concern here, like the ABA Committee's, is that the Association not be in the business of providing legal services for fees. The practice of law by a corporation that employs attorneys but is controlled, in part, by non-lawyers, has repeatedly been found to be in violation of the present and former Canons. *See, e.g.,* ABA Formal Opinion 31 (1931); ABA Informal Opinion 544 (1962). The offense is grounded upon the corporation being in the business of furnishing legal services.

The facts presented here, like those in ABA Informal Opinion 973 (1967), do not support a conclusion that the Association is in the business of practicing law. If the Association and the Educational Council can agree upon a fee schedule that would compensate the Association and if the concerns embodied in Canon 4, relating to confidences and secrets, and Canon 5, relating to confidentiality, are met, the proposed arrangement would not be in violation of the Code of Professional Responsibility.

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[1]Former Canon 35 provides, *inter alia:*
The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client.

[2]Former Canon 47 provided:
No lawyer shall permit his professional services, or his name to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

Opinion No. 95

DR 2-101(A), (B), (C)(1); DR 2-102(B); DR 2-105(A), (B); EC 2-14—Propriety of Advertisement by Attorneys Holding Themselves Out as the "Accident Legal Assistance Center," "Specializing in Serious Injury and Death Claims Caused by Automobile Accidents, Etc."

Our opinion has been requested by Bar Counsel concerning the propriety of an advertisement that reads in form as follows:

ACCIDENT CASES
Serving DC, MD, VA
Specializing in Serious Injury and Death Claims Caused By Automobile Accidents, Etc.
Free initial consultation with experienced personal injury attorneys
ACCIDENT LEGAL ASSISTANT CENTER
Call 765-4321
123 X St., N.W.
Washington, D.C. 20000

Specifically, Bar Counsel has inquired whether (1) the description of the attorneys as "specializing" in personal injury claims violates DR 2-105(A), and (2) the use of the name "Accident Legal Assistance Center" as the only identification violates DR 2-102 (B) because it "(a) fails to identify any particular entity (individual or otherwise) as being responsible for providing the services being advertised or (b) may lead a prospective client to believe that the advertiser has skills and commands resources not available in legal practices generally when, in fact, the skills and resources of the advertisers are no different from those of any competent lawyer in the personal injury field."

We conclude that the advertisement in question does not violate the Code of Professional Responsibility.

I.

Bar Counsel's first inquiry in essence was answered by Opinion 70 of the Committee, where we considered whether lawyers participating in a private advertising and referral service which maintained "specialty panels" violated DR 2-105(A), which states that except in the fields of patent, trademark and admiralty law:

> A lawyer shall not hold himself or herself out publicly as, or imply that he or she is, a recognized or certified specialist....

In Opinion 70 we also considered the applicability to "specialty panels" of EC 2-14, which provides:

> In some instances a lawyer confines his or her practice to a particular field of law. In the absence of local controls to ensure the existence of special competence, a lawyer should not be permitted to hold himself or herself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate, if it is factual, a limitation of his or her practice or that the lawyer practices in one or more particular areas or fields of law in public announcements which will assist lay persons in selecting counsel and accurately describe the limited area in which the lawyer practices.

In Opinion 70, we stated that while we were unable to discern with any degree of certainty the intention of the Court of Appeals as to the use of the term "specialist" in these sections of the Code and Ethical Considerations, we concluded that the addition of the words "recognized or certified" to DR 2-105(A) in the 1978 revision of the Code of Professional Responsibility was intended to qualify the rule and that consequently,

> participation by lawyers in an approved referral service that advertises "specialty" panels is not prohibited by the Code so long as there is no implication in the advertisement that the lawyers have been officially recognized or certified in their specialty.

Here, as in the circumstances presented by the inquiry which generated Opinion 70, our view is that the mere description in the advertisement of attorneys as "specializing in serious injury and death claims caused by automobile accidents etc." does not run afoul of DR 2-105(A) so long as the representation is not "misleading" or "deceptive" under DR 2-101(A), *i.e.*, the attorneys involved in fact devote a substantial portion of their practice to the handling of serious injury and death claims caused by automobile accidents.[1] Assuming that the advertising lawyers devote a substantial portion of their practice to the legal areas in which their "specialty" is claimed, we find nothing objectionable in that portion of the advertisement.

II.

The second question posed by Bar Counsel is more difficult. In the first part of his inquiry, counsel asks whether the use of the name, "Accident Legal Assistance Center", as the only identification in the advertisement violates DR 2-102(B) because it "fails to identify any particular entity...as being responsible for providing the services being advertised...." As we observed in Opinion 70, citing Opinion 53:

> Insofar as anonymity is concerned, our Opinion No. 53...stated that failure of lawyers to identify themselves by name in advertisements for legal services does not violate the Code of Professional Responsibility. That is true whether the lawyers placed the advertisements personally or, as here, through an intermediary.

However, our conclusion that the anonymity of the attorneys whose advertisement prompted the instant inquiry has not caused them to violate the Code of Professional Responsibility does not end our consideration. Two other provisions of the Code, DR 2-101(A) and DR 2-102(B), conceivably have a bearing on the propriety of this advertisement. DR 2-101(A) provides:

> A lawyer shall not knowingly make any representation about his or her ability, background, or experience or that of the lawyer's partner or associate, or about the fee or any other aspect of a proposed professional engagement, that is false, fraudulent, misleading, or deceptive, and that might reasonably be expected to induce reliance by a member of the public.

DR 2-102(B) provides in relevant part:

> A lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, or deceptive within the meaning of DR 2-101 (B), or is contrary to law....

In Opinion No. 81 this Committee was asked to consider whether a business organization which provided advertising services for attorneys and which identified itself in public advertisements as "Legal Counsellors", ran afoul of DR 2-101(A). We concluded that it did for two reasons. First, its advertising created the clear impression that the "Legal Counsellors" was a group of attorneys practicing together in some form of practice when in fact the organization was merely a joint advertising and referral service. Consequently, we concluded that the name "Legal Counsellors" was inherently deceptive and misleading and was "likely to create an unjustified expectation" on the part of the public within the meaning of DR 2-101(B)(3). Second, we concluded that statements in the "Legal Counsellors" advertising that the rates it charged were "reasonable and affordable" were in a form prohibited by DR 2-101(B), which permits no statements regarding fees except those specifically permitted by DR 2-101(B)(5)(a) through (f). None of those subparts of DR 2-101(B)(5), in our view, permitted a statement that fees are "reasonable" or "affordable."

Neither of the reasons which prompted our disapproval of the advertising for the "Legal Counsellors" applies to the "Accident Legal Assistance Center's" advertisement here. First, of course, there is no statement in the advertisement with reference to fees other than a straightforward indication that the initial consultation with the attorneys involved will be "free." A "statement of the fee of an initial consultation" is specifically permitted by DR 2-101(B)(5)(a). Second, unlike the "Legal Counsellors," our understanding from the facts submitted to us by Bar Counsel and gleaned from addi-

[1] In Opinion 70, we suggested that an advertisement by an attorney as a "specialist" in a particular area of law is permissible so long as the attorney devotes "a substantial portionof his or her practice to the legal area in which the 'specialty' is claimed" or *"is otherwise able in good faith to claim special competence in that area."* (Emphasis added.) Upon reflection, it is the Committee's view that an advertisement by an attorney of a speciality based upon the attorney's claim of purported "special competence" in an area would violate DR 2-101(C)(3), which prohibits a public communication by a lawyer which "contains statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public;..." Consequently, we believe that the reference to "special competence" in Opinion 70 was ill-advised, and we have omitted any such reference here.

tional inquiries to attorneys at the "Accident Legal Assistance Center" is that the "Center" essentially is the name chosen by a group of three attorneys, one of whom always responds to calls to the "Center", and all of whom consult with each other concerning cases which come to the "Center." While counsel states in his inquiry that "according to our information" the Center "is not a trade name for a particular practice but rather...a telephone listing where calls are received from prospective clients," he goes on to state:

> The expense of maintaining the listing, advertising, and answering inquiries is borne by three attorneys, as we understand it, and callers are referred to one of those three attorneys for legal services by one of the attorneys who take a turn in the main office. The telephone is located in the office of one of the attorneys who participates in receiving referrals.

Thus, unlike the "Legal Counsellors", the "Accident Legal Assistance Center" is essentially a group of attorneys who are available to assist potential clients, who respond to calls from those clients, who lawfully may assist such clients, and who, while not formally constituting a firm themselves, nevertheless individually are experienced personal injury attorneys who consult with each other concerning the cases of each other's clients who use the "Center." The respondent to calls to the "Center" either is a secretary or other direct representative of the three attorneys to whom clients are referred, or one of the attorneys himself. One of the attorneys with the "Center" has advised us that the three lawyers at the "Center" have twelve, eighteen and over twenty years of experience, respectively, in handling personal injury cases, and that each attorney is a member of his own firm. The three attorneys came together to form the "Center" separate from their practice, we are told, in an effort to pool their experience to expeditiously handle relatively simple personal injury cases susceptible to early settlement, and hoped to attract clients by charging only 15 percent contingency fees in such cases, as opposed to the "going rate" of 33⅓ percent. Thus, clients of the "Center" may not only benefit from reduced legal fees, but potentially in at least some cases, presumably, from the ability of attorneys at the "Center" to consult not only with each other but with members of each of their respective firms in the handling of client cases. We are reluctant to find improper or unethical such an imaginative arrangement, created at least in part to effect significant economies of practice which may be directly passed on to legal consumers.

The fact that the attorneys may not be partners together in a firm is not, in our view, significant where the designation, "Accident Legal Assistance Center", does not create an impression that the advertising attorneys are practicing together in a firm. Rather, it suggests only that the lawyers sponsoring the advertisement specialize in serious injury and death claims caused by accidents, and constitute a group of attorneys other than a single practitioner. As we have observed earlier, this in itself, assuming it is an accurate representation, is not improper nor, do we think, under the circumstances presented to us by Bar Counsel, is the designation, "Accident Legal Assistance Center", improper under DR 2-101(A) or DR 2-102(B), inasmuch as it is not misleading as to the identity, responsibility or status of those practicing at the Center.

Opinion No. 96

DR 4-101(B)—Switching Sides; Use of Confidences and Secrets Against Former Client; Continuation of Obligation To Preserve Confidences and Secrets Even When Acting In Capacity Other Than As Attorney

A lawyer formerly employed by a corporation's legal department as a member of its defense trial team poses the following question: May a lawyer who establishes a computer consulting service offer litigation support services to law firms that are maintaining lawsuits against the lawyer's former corporate employer? Under the circumstances as we understand them, we find that the proposed consulting arrangement would violate a lawyer's continuing duty to respect the confidences and secrets of a former client in accordance with DR 4-101(B).

Facts

The inquiring attorney recently left the legal department of a large corporation and established his own consulting firm. The firm offers computer consulting services to law firms and corporate legal departments. The consulting services include advice on the use of computer techniques to assist lawyers in managing and preparing for complex litigation. The term "litigation support" is used to describe these techniques for organizing and retrieving the massive amounts of information compiled in large, complex cases.

While he was employed as a lawyer with the legal department of a major company, the inquiring attorney was a member of the trial staff in a large antitrust litigation maintained against that company by the federal government. Also pending against the same company are a large number of private antitrust cases that apparently involve related legal and factual issues. The inquiring lawyer asks whether he may, through the new consulting firm, provide assistance to law firms that are pressing antitrust claims against his former employer and may advise them on the establishment of litigation support systems for those cases.

Discussion

The inquiring attorney acknowledges: "I know that the Code of Professional Responsibility does not allow me to become involved as an *attorney* in an action representing a client who alleges damage caused it by some antitrust violation perpetrated by [the former corporate employer]." (Emphasis added) He then asks: "How would this Code be interpreted in my hypothetical situation where I have been retained as a computer consultant to assist such a law firm with their computer system or their litigation support system?" In our view, the hypothetical conduct is equally prohibited. view, the hypothetical conduct is equally prohibited.

The controlling disciplinary rule is DR 4-101(B). This rule prohibits a lawyer, in the absence of consent, from (1) revealing a confidence or secret of his client, (2) using a confidence or secret to the disadvantage of the client, or (3) using a client confidence or secret for his own advantage or the advantage of a third person. In applying these prohibitions, we have no doubt that the duties of confidentiality and loyalty that are enjoined upon a lawyer who has obtained protected information continue after the termination of the privileged relationship. We also conclude that these obligations apply to the lawyer's subsequent activities, even when those activities do not constitute the practice of law. Some questions might arise about enforcement of this duty if the lawyer resigned from the Bar, but the fundamental obligation to preserve a former client's confidences and secrets and to abstain from adverse or self-interested use of them must carry over to business conduct that does not involve the practice of law.

The pivotal question, therefore, is whether advising law firms on establishment of litigation support systems for handling antitrust cases against a former client would involve the use of the client's confidence or secret to the disadvantage of the client or for the benefit of a third person. Under the circumstances presented, we believe that the proposed consulting services would involve such a misuse of confidences and secrets.

It is not inevitable that every lawyer employed by a corporation acquires protected information that would be of benefit to an adversary in establishing the adversary's litigation support system and that would necessarily be used in advising the adversary in such a program. Here, however, we believe that it is likely that the inquiring attorney's former role equipped him with protected information and that competent consultation about an adversary's litigation support system would draw upon the information.

As a member of the trial staff defending against the government's massive antitrust case, the inquiring attorney must necessarily have developed a familiarity with his corporate client's record systems, retrieval capabilities, data bases, and other information disclosed to him as part of the attorney-client relationship but not generally known to the public. The utility of that information in setting up the litigation support system for law firms maintaining related lawsuits against his former employer seems obvious. It is inconceivable that the inquiring attor-

ney could purge himself of this knowledge in rendering advice to new clients on the opposite side of the dispute. DR 4-101(B)(2) bans this use of confidences and secrets to the disadvantage of the former client. At the very least, the apparent utility of the information acquired during his professional relationship would constitute the use of the confidences and secrets to the attorney's own advantage in violation of DR 4-101(B)(3).

In reaching this conclusion we do not suggest that the inquiring attorney is forever barred from providing litigation support systems to law firms that bring suits against his former employer. When only private employment is involved and the special restrictions of DR 9-101(B) are, therefore, not applicable, the principal ethical restrictions that govern the permissibility of "switching sides" are DR 4-101, discussed above, and the conflict of interest restrictions in DR 5-101 and DR 5-105. None of these restrictions absolutely prohibits a lawyer who once represented a client from later representing a client with adverse interests. Where the subsequent representation would not involve the use or disclosure of confidences or secrets, the new alignment is permissible unless the new matter is "substantially related" to a matter handled for the original client. *Cf.* this Committee's Opinion No. 84 in which we decided that, for purposes of disqualification of a former government employee under DR 9-101(B), different cases may constitute the same "matter" if there is a close relationship between the basic facts, the pertinent legal principles, and the interested parties.

Presumably, the same standards would apply to a lawyer who shifts to a career in business that may involve him in opposing the interests of his former client. So long as he is not trading upon the client's secrets or confidences and so long as his new involvement is not substantially related to a matter that he handled as a lawyer for his former client, nothing in the Code of Professional Responsibility would preclude the new undertaking.

Inquiry No. 80-8-29
Approved: November 11, 1980

Opinion No. 97

DR 2-103 and DR 2-108—Propriety of Employment Agreement Restricting Lawyer's Right, Upon Termination of Employment, to Solicit Employer's Clients

This opinion addresses the recurring question of the extent to which a lawyer departing a law firm to establish his own practice may solicit the firm's clients for his own. Inquiry is made on behalf of a District of Columbia firm which in 1976 employed a lawyer —recently departed from the firm—pursuant to a written employment agreement which provided, in part:

> If for any reason [the associate's] association with [law firm] terminates, it is understood that any files, client lists, current cases or other materials from the offices of the firm will be returned by [associate] and *[associate] further agrees to refrain from contacting clients of the firm for the purposes of retaining such clients for his own services.* [Associate], in turn, shall be free to take with him the files and the right to perform legal services for any clients which are his alone (emphasis added).

The question presented is whether this constitutes an agreement restricting the practice of a lawyer in violation of DR 2-108; the Committee finds that it does not.

It appears that the departing lawyer obtained a client list of his former firm and, without objection from the firm, mailed announcements of his new practice to those clients. The immediate concern of the firm is that the departing lawyer, in addition to sending announcements, is engaging in activities which the firm describes as "an active attempt to contact present clients of his former employer, for the purpose of offering to perform legal services for them."

The questions presented are: (1) in general, is it proper for a lawyer to offer legal services to clients of his former firm by solicitation as well as by general announcement, and (2) if so, may the firm prohibit or restrict such solicitation by means of an employment agreement.[1]

The relevant provisions of the Code of Professional Responsibility as promulgated in the District of Columbia are DR 2-103(A) (Solicitation of Professional Employment) and DR 2-108(A) (Agreements Restricting Practice of a Lawyer). They provide:

> DR 2-103(A). A lawyer may not seek, by in-person contact, his or her employment (or employment of a partner or associate) by a nonlawyer who has not sought his or her advice regarding employment of a lawyer, if:
>
> (1) The solicitation involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B); or
>
> (2) The solicitation involves the use of undue influence; or
>
> (3) The potential client is apparently in a physical or mental condition which would make it unlikely that he or she could exercise reasonable, considered judgment as to the selection of a lawyer.
>
> DR 2-108(A). A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

As a result of 1978 amendments, the District of Columbia version of DR 2-108(A) differs substantially from the ABA model. In this jurisdiction, solicitation is not prohibited unless it is accompanied by wrongful conduct—the use of false or deceptive statements, the use of undue influence, or the solicitation of clients apparently unfit to exercise reasonable judgment in selecting a lawyer. Inquirer does not suggest that the departing lawyer has engaged in any of the prohibited forms of solicitation. Thus, considered apart from the employment agreement quoted above, there is no impropriety in the solicitation described.

The employment agreement—which does appear to prohibit the solicitation—must be measured against DR 2-108(A). With exception not here applicable, that rule forbids any employment agreement restricting the right of a lawyer to practice law after the termination of the relation created by the agreement. The question then is whether this restriction on the departing lawyer's right to solicit is a restriction on his right to practice in violation of DR 2-108(A). The Committee finds that it is not.

Two prior opinions of this Committee are relevant in reaching this conclusion. In Opinion 65, we considered and found improper an employment agreement requiring a lawyer, in the event he performed legal services for clients of his former firm, to pay the firm 40 percent of the net billing resulting from such services for a period of two years following the departure. We found that, while the agreement did not flatly prohibit a professional relationship between the withdrawing lawyer and clients of his former firm, it nonetheless created a barrier to the establishment of the relationship. Our concerns were that the contract provision required the 40 percent payment whether or not the attorney/client relationship resulted from solicitation and that, if a client voluntarily followed the departing lawyer, the economics of the situation might result in the lawyer either rejecting the business as unprofitable or charging excessively high rates to cover the 40 percent payment.

In Opinion 77, this Committee again considered the propriety of an employment agreement containing post-departure restrictions on solicitation. That agreement required a departing lawyer soliciting the clients of his former firm *other than by general announcement* to pay liquidated damages to the firm for a period of three years. We recognized the legitimate interest of a law firm in maintaining its clientele and rejected the view that any inhibition on a lawyer's access to clients necessarily violates DR 2-108. We found that the employment agreement described in Opinion 77 did not rise to the level of a DR 2-108 restriction inasmuch as the departing lawyer could, without penalty, service clients who arrived in response to mailed announcements.

The present situation is more akin to that discussed in Opinion 77 than in Opinion 65. Inquirer states that the firm has no objection to mailed announcements. The departing lawyer is thus free to advise potential clients of his availability in this manner and

[1] Inquirer also asks whether the firm may take legal action to enforce the provision. As provided in our rules, we express no opinion concerning legal rights which may be created by the provision in question. Nor do we address the unasked questions surrounding the departing lawyer's procurement of the firm's client list.

to represent them without financial disincentive. The clients will receive information sufficient to allow them to choose whether they wish to be represented by the firm or by the departing lawyer. In the view of the Committee, if the right to send announcements is preserved, the firm may ethically enter into an employment agreement with an associate which limits direct solicitation by the associate after termination of his employment.[2]

Opinion No. 98

DR 9-101(B); DR 5-107(B)—Former Staff Attorney for Public Defender Service Acting as Private Counsel for Person Previously Represented as Assigned Defense Counsel

Synopsis

As a staff attorney in the office of the District of Columbia Public Defender Service, the inquirer represented an individual in connection with a criminal proceeding in which that individual had been convicted. The individual was released pursuant to a motion for new trial, and now, asserting his innocence of the crime charged, wishes to pursue civil remedies for wrongful conviction. The inquirer, who has left the Public Defender Service is now in private practice, asks whether he may represent the individual in seeking such civil relief. We conclude that such representation would not violate DR 9-102, although the civil proceeding does constitute the same "matter" as the earlier criminal proceeding, because of the unique nature of the government employment associated with service as a staff attorney with the Public Defender Service.

Facts

The inquirer formerly served as a staff attorney with the District of Columbia Public Defender Service ("PDS"). Pursuant to Chapter 22 of Title 2 of the District of Columbia Code, the PDS has been established to provide legal representation to individuals charged with crimes in the District of Columbia who cannot afford to retain counsel at their own expense. For the purpose of this opinion, we assume that such staff attorneys are technically government employees.[1] Although such staff attorneys are paid from public funds, they are not counsel for the District of Columbia or United States governments. Rather, pursuant to court appointment as counsel to specific individuals charged with crimes in this jurisdiction, they perform the same services for such individuals as would be performed by privately retained counsel. The PDS staff attorney establishes an attorney-client relationship with the individual whom the attorney is appointed to represent, and otherwise functions in a fashion virtually indistinguishable from that of private counsel.

While serving as a PDS staff attorney, the inquirer was appointed to represent an individual in the Superior Court who had previously been convicted of a serious crime. We are advised that substantial doubts thereafter arose concerning the defendant's guilt; that the inquirer made a motion for new trial, which was granted, and that there is virtually no possibility that the former defendant will be retried. The former client has asked the former staff attorney, now in private practice, whether the attorney can represent him in seeking civil relief for wrongful conviction. The inquirer asks whether he may do so consistent with DR 9-101(B).

Discussion

The current version of DR 9-101(B)[2] provides as follows:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

This is, of course, the provision implicated in the so-called "revolving door" problem. At least two areas of inquiry are suggested: (1) Would representation of the former defendant in a civil proceeding constitute representation in the same "matter" as was involved in the prior motion for new trial? (2) If the same matter is involved, does the special nature of government employment involved in staff attorney positions with PDS render inapplicable the customary prohibitions on a former government attorney accepting private representations on a matter in which he or she had "substantial responsibility" (the language of DR 9-101(B)) while in government service.

Turning first to the identity of "matters," we conclude that the subsequent civil proceeding for wrongful conviction involves the same matter as the prior criminal proceeding. Determining what is the same matter is, in our view, an essentially factual and pragmatic inquiry. It would be possible to treat every distinct form of proceeding under a different statutory provision, or every distinct cause of action, as a separate matter without regard to any underlying factual nexus between such proceedings. We think such an approach is unjustified. There may be for various technical reasons, all sorts of separate proceedings, civil or criminal, conducted under different docket numbers in the same or different forums, which all arise from a single set of underlying facts, circumstances or transactions. In our view, it is the factual relationship between various proceedings or claims which determine whether they constitute the same matter.[3] Here, for example, the underlying factual circumstance involved is allegedly wrongful conviction of the former defendant. That allegedly wrongful conviction is central to the successful motion for new trial, but it is obviously central as well to any subsequent suit seeking relief for wrongful conviction. To treat the former criminal action and the potential civil action as different matters would ignore substance and exalt technicality. We therefore conclude that the criminal and civil proceedings constitute the same matter within the meaning of DR 9-101(B).

Were this a typical case involving a former government attorney, our conclusion that the same matter is involved in the proposed civil proceeding for wrongful imprisonment would bring an end to our analysis, for there is no doubt here that the inquirer had "substantial responsibility" for the same matter —*i.e.*, the criminal proceeding—while serving as a public employee. In our view, however, the somewhat unusual nature of PDS staff attorney duties requires further examination and analysis.

In the typical situation involving a former public employee, the attorney involved, while in government service as an attorney, was subject to the usual obligations of an attorney with respect to his client—the government whom he or she served. Those obligations include the duty to protect client confidences, to avoid conflicting interests, and generally to afford undivided loyalty to the government which was the client.

Staff attorneys in the PDS do not possess the same relationship to the government which pays their compensation. They are, essentially, paid to represent those other than the government which employs them. Indeed, they are paid to represent those whose interests are, from the outset, adverse to those of the government in the sense that another government agency—in this case, typically, the United States Attorney's Office—is seeking to convict the staff attorney's client, while the staff attorney's duty is to use every ethically and legally permissible means to avoid such a conviction. In pursuing that duty, the PDS staff attorney receives confidences and is obliged to protect them; just as in other situations where one person pays an attorney to represent another person, the attorney's duty runs to the client represented rather than to the person having the power of the purse. *See* DR 5-107 (B).

[2]Although the contract provision under consideration is of unstated duration, the Committee assumes that it will of course be limited to a reasonable period.

[1]Whether such staff attorneys are, in fact, government employees, is, we are advised, a question which had not been definitely resolved. It is unnecessary for the purpose of this opinion to resolve the question.

[2]Proposed revisions to the disciplinary rules under Canon 9 are pending with the District of Columbia Court of Appeals, pursuant to the Petition of the Board of Governors of the District of Columbia Bar of February 9, 1979. The proposed revisions address possible areas of change which are largely unrelated to the issues presented by this inquiry.

[3]This committee has consistently taken a broad, fact-based approach for defining the term "matter" in DR 9-101(B). *See* D.C. Bar Ethics Opinions No. 16, 26, 82, 84 and 92. *See also* ABA Formal Opinion 342 (1975). *Cf.* ABA Informal Opinion 1374 (1976) (SEC enforcement action and subsequent civil suit concerning common transactions held to be same "matter" for purposes of DR 9-101(B)).

It may be helpful to contrast the role of the PDS staff attorney with that of another government attorney who clearly would be subject to the normal application of DR 9-101(B). Suppose that a former Assistant United States Attorney, who had represented the government as a prosecutor in connection with the previous motion for new trial, were now seeking to represent the former accused in pursuing civil relief for wrongful prosecution. The former prosecutor would fall squarely within the prohibitions of DR 9-102(B), for the prosecutor previously had a duty to the United States for the same matter. Unlike the PDS staff attorney, the prosecutor could not properly have established an attorney-client relationship with the former accused; the prosecutor's obligations to avoid the compromise of privileged information and to avoid conflicting loyalties are owed to the United States.

It seems to us that the differences between the two positions—prosecutor and former PDS staff attorney—compel a different result. Both are, by hypothesis, former public employees. Both have had substantial responsibility for a matter which must be viewed as the same matter involved in the prospective civil proceeding. But the former PDS staff attorney would, in representing the former accused, have precisely the same client as he had in the prior criminal proceeding. He would not have "switched sides." And, translating the matter into the context of a criminal defense provided by private counsel, it would be a normal, perhaps predictable occurrence for the former accused to seek the assistance of *his lawyer* in the criminal proceeding—a lawyer already familiar with much of the factual information on which a civil claim might be based—in pursuing such a civil claim.

While it may be quite natural for a former PDS attorney to pursue civil proceedings on behalf of one who became a client by assignment in a criminal proceedings, our analysis should not end there. DR 9-101(B) was designed to discourage government employees from so conducting themselves while in public service as to create a subsequent benefit to themselves after returning to private practice. It was also designed to prevent, in the particular circumstances to which it applies, the "appearance of impropriety" referred to in Canon 9 itself. Would it contravene these purposes of DR 9-101(B) if a former PDS staff attorney were permitted to provide representation in the circumstances here?

We conclude that the policies underlying DR 9-101(B) would not be offended by permitting the representation in question. It is difficult to perceive how allowing such a representation would alter the conduct of PDS staff attorneys or cause them to behave other than in accordance with their obligations to their clients and to the public. They are ethically required to exert every proper effort on behalf of such clients, and doing so is the essence of their job rather than an improper conflict with the government's interest. Perhaps some fanciful hypothetical can be constructed which would suggest that such staff attorneys would look to future private interest in representing criminal defendants, but we view the risks of such misconduct as too remote to be given weight.

Nor do we perceive that a palpable "appearance of impropriety" would be created by permitting the representation in question here to proceed. It does not appear likely that a reasonably informed member of the bar, or of the public, would view such a representation as improper. On the contrary, the bar and the public might well look askance at a rule which prevented the client here from pursuing his choice of counsel, based on an apparently satisfactory previous attorney-client relationship. It may be that *some* element of the bar or the public would view the proposed representation as involving an appearance of impropriety; there are those who perceive appearances of impropriety in almost any professional activity by attorneys. However, an attorney's conduct need not be governed by "standards which can be imputed only to the most cynical members of the public." *Woods* v. *Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976).

This inquiry involves considerations quite like those in the *Woods* case, *supra*. There, an attorney had established an attorney-client relationship with individuals while serving as a legal assistance officer pursuant to the Navy Judge Advocate General's Corps legal assistance program. Subsequently, in private practice, the attorney sought to represent the same parties as plaintiffs in civil litigation. The Fifth Circuit rejected efforts by defendants' counsel to have the plaintiffs' counsel disqualified. In doing so, the Court rejected a literal application of DR 9-102(B), saying that such an inflexible application of Canon 9 would "frequently defeat important social interests, including the client's right to counsel of his choice...." *Id.* at 812, citing with approval *International Electronics Corp* v. *Flanzer*, 527 F.2d 1288, 1293 (2d Cir. 1975).

Here, as in *Woods*, there would appear to be no abuse of public trust in finding the representation to be permissible. *See* 537 F.2d at 816. Similarly, there appears to be no possibility that the former PDS staff attorney might have an undue advantage in obtaining information because of his "public" position; whatever "color of official power" may be associated with, for example, the position of government prosecutor has no application to PDS staff attorneys. Such staff attorneys do not possess special powers to obtain information which differ from those available to private attorneys representing criminal defendants. They are not able to use the grand jury as a tool for obtaining information. And they do not have special access to policy or F.B.I. reports. *Cf.* 537 F.2d 816-18.

Like the Fifth Circuit in *Woods*, we are persuaded that literal application of DR 9-101(B) to the circumstances of this inquiry is unwarranted. Accordingly, we conclude that the inquirer may ethically undertake the proposed representation.[4]

Opinion No. 99

DR 4-101—Preserving Confidences When Existence of Attorney/Client Relationship Is Uncertain

Inquirer, a lawyer in the District of Columbia, has been subpoenaed to testify before a grand jury regarding alleged criminal activity of an individual identified as "B." B has made statements to inquirer which—at least to inquirer—tend to implicate B in the matter under investigation. It appears that, in a prior unrelated criminal proceeding, inquirer filed a motion on behalf of B and received some payment for his services. Inquirer expresses doubt and confusion as to whether B's recent statements were made in the course of an attorney/client relationship.

Resolution of the ultimate fact question— whether a professional relationship existed between inquirer and B—requires information concerning what B may have reasonably thought concerning the relationship. That information is simply not available to the Committee. On prior occasions, the Committee has declined to issue an opinion requiring factual determinations which cannot be made on the basis of an inquirer's representation (e.g., Opinion 88).

In this case, however, the ethical question arises precisely because of the unclarity of the fact situation. The duty to preserve the confidences and secrets of a client is grounded in the existence of the attorney/client relationship. Canon 4; DR 4-101. Here, the existence of the attorney-client relationship is problematic. The question presented is whether there is a duty of nondisclosure in this uncertain circumstance. The Committee believes that it does.

Obviously, the potential for unethical conduct—and the risk to be protected against—is that of disclosing confidences or secrets of one who is ultimately found to be a client or former client. Thus, if there is a colorable basis for asserting that the statements were made in the course of an attorney/client relationship, the lawyer must resolve the question in favor of the existence of that relationship and in favor of preserv-

[4]We do not, of course, express any opinion concerning the potential applicability of 18 U.S.C. § 207(a), a portion of the Ethics in Government Act of 1978, to the facts presented in this inquiry, as the Committee does not generally express opinions on matters of law not involving interpretation of the Code of Professional Responsibility. Section 207(a) does contain provisions similar in effect to DR 9-101(B); interpretation of its provisions is the responsibility for the Office of Government Ethics.

ing the confidentiality of the disclosures. This colorable basis standard obtains even when—as here—the lawyer's personal view is that the attorney/client relationship either never eisted or was terminated prior to the disclosure at issue.

Under DR 4-101(C)(1) and (2), the supposed client's statements may be disclosed only with his consent after full discussion or as required by law or court order. Thus, assuming B in the present inquiry does not consent to disclosure of his statements, inquirer's obligation is to assert before the grand jury the confidentiality of those statements. Of course, inquirer may ultimately be compelled to disclose by court order upon a finding of nonexistence of the attorney/client relationship. However, as we pointed out in Opinion 83, disclosure pursuant to court order is not unethical. The ethical obligation of the inquirer is simply not to compromise his client's position voluntarily, and that obligation continues until the relevant forum has resolved in the negative the question of the existence of the attorney/client relationship.

Inquiry No. 80-9-33
January 28, 1981

Opinion No. 100

DR 5-103(A)(1); DR 2-110(A)(2); EC 5-7; EC 2-23—Propriety of Retaining Lien of Attorney As To Money Held in Escrow Account Where The Client and Attorney Have Mutually Agreed To The Termination of Representation; Propriety of Satisfaction of Attorney's Retaining Lien From Client's Assets In The Attorney's Possession

Synopsis

A practicing attorney has requested an advisory opinion concerning his right and the propriety of a retaining lien against assets held in escrow by him for a former client who is indebted to him for professional services. He further inquires as to his right to use the funds in the escrow account to satisfy his claim for professional services.

The Committee concludes that the assertion of a retaining lien by an attorney is ethically and legally proper where the attorney and client have mutually agreed to the termination of the attorney-client relationship. Where the relationship is unilaterally severed by the attorney, there must be just and reasonable cause supported by timely notice to the client. Here, the inquiring attorney meets the standards and has a retaining lien assertable agains the client's assets now in the possession of the attorney.[1]

As for the question regarding the propriety of satisfying the retaining lien from client's assets held in escrow by the attorney, we are constrained to conclude that, in the absence of statutory provisions or agreement between attorney and client, the attorney's retaining lien does not give rise to a right of set-off.

Facts

The inquiring attorney had represented a client for some time during which time sizeable attorney fees accumulated. Through extensive efforts of the attorney in a contingency fee case, separate and distinct from other legal services provided the client, the attorney recovered over eight thousand dollars. Based on the contingency fee agreement, the attorney received 50 percent of the sum recovered. The client received $2,000 to cover some personal expenses and the balance of $1,500, by mutual consent, was placed in an escrow account to pay a creditor of the client. Because of alleged administrative problems in disbursing the money and the client's reconsideration as to the use of the funds, the attorney did not disburse the funds as originally planned. Those funds now remain in an escrow account under the control of the attorney. In the interim, the attorney, recognizing the alleged instability of the client, chose to discontinue his representation of the client, but not before arriving at what he thought was a mutually satisfactory release. The attorney asserts that at the time he agreed to the release of the $1,500, for benefit of a third party, he was operating on the premise that the fees owed him would be satisfied from prospective recoveries he would get on behalf of his client. Moreover, the inquiring attorney alleges that the client through histrionics and deceit, obtained a release.

Issues

The specific issues are:

1. Whether an attorney who terminates his relationship with the client is entitled to a retaining lien against assets of the client still in the attorney's possession.
2. Whether the mutual agreement between attorney and client that certain funds be set aside for the benefit of a third party, constitutes a relinquishment or waiver of the right to a retaining lien by counsel.
3. Whether an attorney holding assets in escrow belonging to a former client is entitled to the use of said assets in satisfaction of unpaid attorney fees.

Discussion

Propriety of Retaining Lien of Attorney After Mutual Termination of Lawyer-Client Relationship

The first issue regarding the retaining lien has been previously addressed in depth by the Legal Ethics Committee.[2] In that opinion it was clearly established that the retaining lien is viable in the District of Columbia. Nonetheless, it bears reiterating that the notion of the retaining lien is of common law origin and it encompasses the right of an attorney to retain possession of all papers, securities and money belonging to his client which he has received during the course of performing professional services for the client.[3]

Relative to the specific assets at issue, it is generally held that an attorney's general or retaining lien attaches to monies in his possession as a lien for all professional services rendered the client regardless of the cause of action giving rise to the monies or property held.[4] This principle, however, does not extend to monies and property which have come into the possession of the attorney in other than his professional capacity or for a special purpose.[5]

The manifest purpose of the retaining lien, then, is to give the attorney leverage in recovering the fees and taxable costs owed him for professional services provided his

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[1]In some quarters, the retaining lien is viewed as having only "nuisance value" and is an ineffectual mechanism for the resolution of differences arising between the attorney and client about fees. *See* Footnote 6, *infra*, pp. 308-309. Along these lines, the Committee again expresses serious doubts about whether the Code should continue to permit lawyers to assert retaining liens.

Another area of some concern grows out of the possibility for the controversy over fees not being resolved by the imposition of the retaining lien. When this occurs, the attorney should bring suit for his services within a reasonable time. *Leszynsky* v. *Merrit* 9 F 688 (CC NY 1881); *Grace* v. *Fisher* 355 F2d 21 (CA 2 NY, 1966). This makes eminently good sense particularly where the continuing dispute over fees is tantamount to a gross imposition for both the attorney and client. Such a posture of pursuing arbitration or litigation after the burden of the retaining lien fails to effect a resolution, appears to be consonant with EC 2-23 of the Code which admonishes that

> A lawyer should be zealous in his effort to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

[2]*See* District of Columbia Bar Legal Ethics Committee, Opinion No. 59.

[3]*McPherson* v. *Cox* 96 U.S. 404 (1878), *Lyman* v. *Campbell*, et al. 81 U.S. App. D.C. 44, 45, 182 F.2d 700.

[4]*Norrell* v. *Chasan* 125 NJ Eq 230, 4 A2d 88. Note that the general or retaining lien is readily distinguishable from the special or charging lien. The retaining lien is bottomed on possession whereas the charging lien is founded on the principle that an attorney has a right to be paid his fees and expenses specifically out of the proceeds or judgment resulting from his labor, professional services and representation in a given cause of action. Further, the special or charging lien affords the attorney the right to seek the aid of the Court for the protection and enforcement of the attorney's charging lien. The charging lien, unless otherwise authorized by statute or agreement, is limited to the cause of action from which the recovery or judgment arose. The charging lien is not applicable to other outstanding balances or fees for professional services provided in other matters. Speiser, Stuart M., *Attorney's Fees*, Lawyers Co-Operative, Rochester, 1973, § § 16:14-16:17.

[5]*See Attorney's Retaining Lien Over Former Client's Papers*, 65 Column L. Rev. *296, 299:* "...the lien will not apply to documents received in the capacity of a trustee, or mortgagee, or in connection with transactions that do not concern strictly legal services..."

client.[6] This leverage or advantage arises out of the expectation that the retention of the client's property will embarrass, worry and inconvenience the client.[7] Circumstances, however, may well dull the sensibilities of the client to the point the client is recalcitrant and feels no inconvenience or embarrassment.[8] Thus, the retaining lien, figuratively speaking, becomes a "swordless sword and a toothless saw" without a cutting edge.

Although an attorney severs his relationship with a client or vice versa, it does not follow *ipso facto* that the retaining lien evaporates. Generally, a retaining lien remains in force and effect provided the attorney withdraws for just cause and gives reasonable notice. Conversely where the attorney withdraws from a case without just cause or reasonable notice, he will forfeit his retaining lien.[9] Assuming the validity of the facts as given by the inquiring attorney, it would appear for purpose of this inquiry that the inquiring attorney withdrew with the concurrence of the client and therefore is well within the ambit of the Code.[10]

Relinquishment or Waiver of Retaining Lien

A composite of the facts demands consideration of the possibility of the relinquishment or waiver by the inquiring attorney of the right to a retaining lien. The retaining lien is not absolute and may be relinquished by (1) the attorney voluntarily giving up possession of the property to which the lien attaches;[11] (2) unjustifiably terminating the attorney-client relationship;[12] (3) suspension of the attorney from the right to practice law;[13] (4) filing of property in Court and bringing an action for judgment;[14] and (5) entering into an agreement with the client.[15]

According to the inquiring attorney his client and he mutually agreed that a sum certain be set aside for a third party. At the time of the agreement, the attorney apparently had not asserted his right to a retaining lien, but proceeded to establish an escrow account for the third party beneficiary. Once this agreement gave rise to an escrow account, a collateral issue of some moment emerged—that is, whether the act of the attorney was tantamount to the assumption of a fiduciary role, thus relegating to possible obscurity his right to a retaining lien.

In *City of New York* v. *Avenue U. Service Center, Inc.*,[16] the Court held that

> ...as to the attorney's alleged lien, the escrow agreement does not indicate any intention on the part of the parties that the escrow funds be used to pay attorney's fees. The agreement provides that the moneys deposited are to be used for the purpose of securing the payment of creditors, lienors, mortgages, taxes or claimants, and no mention is made of attorney's fees. These moneys on deposit with the attorney constitute trust funds and it would seem to me that the sole purpose of the deposit was to pay taxes due the city and other debts of the seller incurred in connection with the business, and not the attorney's fees arising out of the sale....

Albeit the funds in the escrow account are remnants of a recovery by the attorney on behalf of the client, a charging lien would not lie since attorney fees were taken off the top consistent with a contingency fee agreement. Therefore, the funds now in the possession of the attorney represent property supposedly being held for the benefit of a creditor of the client. At least that was the original agreement until the client apparently changed his/her mind. The character of the escrow had initially all the earmarks of a trust for the benefit or a creditor, revocable[17] at the client's (grantor's) direction prior to disposition of the assets constituting the "corpus." The client's revocation of the trust caused the assets in the trust to revert to the client, thus the assets became property of the client held in escrow by the attorney. Such revived the right to a retaining lien, exercisable by the inquiring attorney.

Propriety of Satisfaction of Retaining Lien of Attorney From Client Assets in Possession of Attorney

The right flowing from a retaining lien is embodied in possession and is simply a right of the attorney to retain his client's property until the attorney's fees are fully paid.[18] It is a passive right which does not enlarge into or confer the right to enforce the lien through the sale of the property subject to the lien.[19] The same logic which underlies the unenforceability of a retaining lien through the sale of property is applicable to a set-off or distribution of monies of a client in favor of an attorney having monies in his possession. In the absence of local law or agreement between parties permitting satisfaction of the lien out of assets held by the attorney, a set-off would not lie.[20]

Opinion No. 101

DR 9-101(C), EC 9-6, Canon 9—Lawyer Appearing Before Judges of a Board of Contract Appeals Whom the Lawyer Is Representing Personally In An Unrelated Matter

We are asked to identify the ethical inhibi-

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[6] *Mahomet* v. *Hartford Ins. Co.*, 3 Wash App 560, 477 P2d 191 (1970).

[7] *Ibid.*

[8] *See* Note 5, p. 304.

[9] *See* Note 5, *supra*.

[10] ...A lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client... Code on Professional Responsibility, DR 2-110(2).

[11] *Kysor Industrial Corporation* v. *Merritt* 9F 688 (CC NY, 1881).

[12] *The Flush* 277 F 25 (CA 2 NY, 1921) *cert. denied* 257 US 657 (1922).

[13] *Gray* v. *Cohen*, 34 Misc. 2d 971, 231 NYS 2d 394 (1962).

[14] *Reynolds* v. *Warner*, 128 Neb 85, 258 NW 462 (1935).

[15] *See* Note 8, p. 303.

[16] 141 NYS 2d 584, 585.

[17] "A trust...when not qualified by the word "charitable," "resulting" or "constructive," is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. *Restatement of the Law of Trusts 2d*, § 2. *The Committee refers to trust law herein for purposes of explanation of a legal ethics issue and does not purport to adjudicate or opine any issue(s) of trust law.*

...If the legal title to the money or other property is vested in the third person but not he beneficial interest, he takes the property as trustee either for the debtor or creditor. Whether the trust thus created is for the debtor or the creditor depends upon the manifestation of intention of the debtor. The inference ordinarily is that the debtor is the beneficiary of the trust, or that if it is a trust for the creator the debtor can at any time revoke it....*Scott on Trusts*, § 330.6.

[18] *See Smyth* v. *Fidelity & D Co.* 326 Pa 391, 192 A 640. In Smyth the Court enunciated the general rule "...that the retaining lien is a mere right of the attorney to retain the papers, etc. ...it confers no further rights and is valuable to the attorney in proportion to the extent such retention will embarass the client, that is to say, *he cannot sell said papers* (emphasis supplied) under process to foreclose his lien as may a pledgee or mortgagee in other cases...."

In another case, the Court held that an attorney's "...retaining lien on policy in his possession for services does not, by reason thereof, possess lien on proceeds of policy deposited in Court by insurer pending determination of party entitled thereto since retaining lien on policy is mere passive right to hold the policy and confers no right to funds represented thereby...." *Modern Woodmen of American* v. *Cummins* 216 Mo App 404, 268 SW 383.

[19] *Modern Woodmen* v. *Cummins, supra; Morse* v. *Eighth Judicial Court* 65 Nev 275, 195 P2d 199; *Robinson* v. *Rogers* 237 NY 467, 143 NE 647; *Hoxsey* v. *Hoffpauir* 180 F2d 84 *cert. denied* 339 US 953.

[20] *See* ABA Committee on Professional Ethics, Informal Opinion No. 859 August 4, 1965, which held that

> ...where local law specifically permits the lawyer to deduct his fee from escrow funds held by him either to satisfy a lawyer's lien or otherwise, then it is not unethical for the lawyer to do so...in the absence of local law specifically authorizing such deductions, then, if there is no agreement between the attorney and the client which would permit the deduction from the escrow funds of the lawyer's suggested fee, the Committee believes it would be unethical for the lawyer to retain even what he believes to be a fair and reasonable fee for his services from such funds. The matter in controlled by local law and in the absence of local statutory or case law on the subject, there would appear to be no authority to make the deduction in the absence of a specific agreement between the attorney and client....

tions, if any, on a lawyer's appearing before an administrative judge who, in a matter unrelated to the occasion for the appearance, is personally represented by the lawyer.

The factual setting giving rise to the inquiry is as follows. The lawyer is employed by a federal agency that maintains a Board of Contract Appeals ("BCA"), which decides contract disputes between the agency and its contractors. The judges of the BCA are similar to, though not technically the same as, administrative law judges.[1] Cases before the BCA are tried, much in the manner of court cases, before a single judge. That judge renders a decision which is then considered by a panel that includes two other judges. At the time the inquiry was submitted, the lawyer had recently represented three of the judges of the BCA, as a Special Assistant United States Attorney, defending them in a suit for damages arising out of the performance of their duties as members of the BCA. The defense was successful in the trial court, but at the time of the inquiry the case was pending, on plaintiffs' appeal, in the United States Court of Appeals; the lawyer had submitted a brief in that court on behalf of his clients; and the case had not yet been set for argument.

The inquirer posed two questions:

(a) Whether any provision of the Code of Professional Responsibility would bar the lawyer from appearing in cases before any of the three BCA judges while the appeal was pending; and
(b) If so, whether the ethical inhibition would be removed if, in any case in which the lawyer was to appear before one of the judges, he gave notice to opposing counsel of his attorney-client relationship with the judge, and opposing counsel did not object.

We conclude that there is no ethical restriction imposed by the Code of Professional Responsibility upon the lawyer in these circumstances; and, having thus answered the first of the questions posed, we have no need to address the second. However, as explained in the Separate Statement appended to this Opinion, there is colorable (though far from compelling) ground for an argument that the judges should consider recusing themselves from cases in which the lawyer appears on the ground that their impartiality might be questioned because of their relationship with the lawyer; or else making disclosure and securing waiver of objection by the opposing counsel, in the fashion suggested by the inquirer's second question.[2] For this reason, it may be that even though the lawyer is subject to no obligation under the Code in this regard, opposing counsel may reasonably have an expectation that they will be given notice of the relationship, and afforded the opportunity of suggesting recusal. Thus as a matter of prudence and professional etiquette, albeit not ethical mandate, it may be advisable for the lawyer at least to raise with the judges whom he is representing the question whether they deem it appropriate to recuse themselves, and if not whether opposing counsel should be notified of the representation and of the judges' decision regarding recusal.

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Looking solely to the situation of the lawyer in the circumstances before us, we find no provision in the Code of Professional Responsibility—nor any in the former Canons of Professional Ethics—imposing any ethical bar to a lawyer's appearing before a judge whom s/he is separately representing, or even requiring the lawyer to make disclosure to opposing counsel of the fact of the representation.

If, as suggested in the attached Separate Statement, there is ground to argue that there might be some obligation on the judges to consider recusal in such circumstances, it might be thought that the lawyer would also have some derivative ethical obligation; but there is no provision in the Code reflecting any such obligation. The one ethics committee decision we have found on the point, ABA Informal Opinion 1306 (1974), confirms that any ethical obligation in such circumstances rests on the judge, not the lawyer. That opinion addressed a case where both the judge and his wife were clients of the judge's former law firm, and the question was whether, in view of both the current and the former relationship, the firm's lawyers could properly appear before the judge; the committee expressed the view that the decision was one for the judge, not the lawyers, to make.

If it were thought that the failure of a judge to recuse her/himself involved a "professional impropriety," then it might be argued that the lawyer's failure at least to initiate such recusal would involve an appearance of such impropriety so as to come within Canon 9's broad assertion that "a lawyer should avoid even the appearance of professional impropriety." EC 9-6 contains equally general language, which might also be broadly read as applicable in such circumstances:

> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof;...to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

However, under the current Code the Canons are not intended to be rules of conduct, but only "statement of axiomatic norms," embodying the "general concepts" from which such rules are derived; and, correspondingly, Ethical Considerations are only "aspirational in nature," not specific rules of conduct. It is the Disciplinary Rules that are mandatory in character, and enforceable; and none of these in the present Code can fairly be read to apply to the matter before us.[3] A Disciplinary Rule that might have application in some circumstances is DR 9-101(C), which states that "a lawyer shall not...imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official." It is, however, clear that this provision would have applicability only if the lawyer were using his relationship to the judges to suggest to his client (which in this case is the agency which also employs the judges) or some other person that it gave him a special power to influence their decisions—a circumstance that is in no way suggested by the inquiry here addressed.

Thus, viewing the circumstances in question only as they affect the lawyer's conduct, we conclude that there is no ethical bar to the lawyer's appearing before any of the judges, nor any ethical requirement that the lawyer notify opposing lawyers of his representation of the judges. However, it may be sensible nonetheless, for a lawyer in circumstances like these, at least to raise with the judges the question whether they deem it appropriate to recuse themselves from cases in which the lawyer will appear before the BCA, and if not whether opposing counsel in a case in which the lawyer is to appear before them should be given notice of the lawyer's separate representation of the judges, so that such counsel may if they think it advisable pursue the question of

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[1] 41 U.S.C. § 607, governing the establishment of agency boards of contract appeals, provides that the members of such boards "shall be elected and appointed to serve in the same manner as administrative law judges."

[2] The discussion of the situation of the judges, as respects recusal and/or disclosure in the circumstances here presented, is set out in a Separate Statement rather than in the body of this Opinion not merely because it addresses questions not directly posed by the inquiry, but in addition because it involves interpretation of texts—the ABA's Code of Judicial Conduct, and 18 U.S.C. § 455—which this Committee has no special jurisdiction to deal with. The Committee's rules give it responsibility to issue opinions interpreting only the Code of Professional Responsibility; and state that it will not ordinarily give opinions on questions of law. Rules of the Legal Ethics Committee of the District of Columbia Bar, Rules A-1, C-1, and C-5.

[3] In this Committee's Opinion 48 (1978), we took a somewhat more expansive view of the weight to be given to Canon 9 and EC 9-6, but the circumstances there before us, where a lawyer would have assumed a quasi-judicial office in an agency before which he and his firm would also continue to practice, also involved a much more clear-cut and potentially serious impropriety than anything suggested here.

recusal. We make this suggestion not because we view it as ethically required but simply as a matter of practicality and professional courtesy because, as explained in the Separate Statement that follows, there is room to argue that the judge in such circumstances should consider recusal; and this being so, opposing counsel might reasonably entertain the expectation that they would be advised of the possible grounds for such consideration where recusal had not occurred.

Inquiry No. 78-5-10
May 22, 1981

Separate Statement Regarding Possible Obligations of the Judges

If the matter discussed in the foregoing Opinion is viewed from the perspective of the Board of Contract Appeals judges whom the lawyer represents, it takes on a somewhat different cast.[4] The judges in question are not, of course, true judges in the ordinary sense, so as to be bound by either the ABA's Code of Judicial Conduct or provisions of the Federal Judicial Code governing judicial conduct. Administrative law judges are not subject to these provisions, but only to the "canons of ethics of the bar and the ethical standards of the Federal Government and [their] agency," *see* Administrative Conference of the United States, Manual for Administrative Law Judges 59 (1974); and judges of boards of contract appeals are presumably held to no higher standards.[5] Nonetheless, a BCA judge (or an administrative law judge, for that matter) might well look to the Codes governing judges of courts for guidance in a matter that, like this one, involves a function—impartial adjudication—where the standards applicable to such judges are obviously germane. Were such a judge to do so, it is not impossible that s/he would conclude that recusal or at least disclosure to counsel in a particular case before the judge was appropriate.

To address the ABA's Code of Judicial Conduct first, Canon 3C(1) states in general terms that a "judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . ." The Canon goes on to identify a series of specific circumstances in which disqualification is called for, none of them having reference to the judge being represented by a lawyer appearing before him; but its text makes clear that although the prohibition is intended to include these specific instances it is not limited to them. There can be no doubt that the fact that a lawyer appearing before a judge also represents the judge in a professional capacity could, at least in some circumstances, give ground to question the judge's impartiality within the meaning of Canon 3C(1). *See Texaco Inc.* v. *Chandler,* 354 F.2d 655 (10th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966) (judge must recuse himself when counsel for a party has acted as the judge's counsel in an unrelated matter); ABA Informal Opinion 1306 (1974), discussed in the Opinion above.

If Canon 3C(1) of the ABA's Code were deemed to impose an obligation of recusal, then that obligation would not be eliminated by disclosure to opposing counsel and an absence of objection by them. Canon 3D does provide specifically for remittal of certain disqualifications under Canon 3C(1) in this manner, but the disqualifications to which this applies are only those relating to financial interests and family ties, and not the general provision with regard to impartiality quoted above.

The Federal Judicial Code also deals with disqualification of judges, in 28 U.S.C. § 455, which as amended in 1974 is fairly close in both form and substance to the Canons of the ABA's Code, though it also varies from them in some pertinent respects. Subsection (a) of § 455 provides in general terms very similar to those of Canon 3C(1) that:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Subsection (b) then specifies, in a fashion roughly parallel to the subparagraphs following Canon 3C(1), a series of specific grounds for disqualification, including one relating to counsel:

> . . . He shall also disqualify himself in the following circumstances:
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> . . . .
> (ii) Is acting as a lawyer in the proceeding.

Thus, the statute, unlike the Canons, makes specific reference to the identity of counsel as a ground for the judge's disqualification —though this is tied to familial relationships rather than merely professional ones.[6]

Finally, subsection (e) of § 455 contains the following provision for relief from disqualification:

> No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

It will be noted that the statutory provision, unlike the Canons, does not allow a waiver of disqualification if the ground for disqualification is one of those specified in subsection (b), but it does contemplate such a waiver if the disqualification arises under the general rubric that "impartiality might reasonably be questioned." Where a judge would otherwise be required to disqualify himself by reason of a professional relationship with counsel, therefore, the disqualification could be waived.

Although it is clear that at least before its revision in 1974,[7] 28 U.S.C. §455 could have required a judge's recusal by reason of the judge being represented by counsel in a purely private capacity, *see Texaco Inc.* v. *Chandler, supra,* the courts required when the representation involved actions taken by the judge in an official capacity—which, it should be noted, is in substance the case in the inquiry addressed in the foregoing Opinion. *Compare Rapp* v. *Van Dusen,* 350 F.2d 806 (3d Cir. 1965) (judge should not sit in subsequent phases of litigation when he has been represented by counsel for a party in a mandamus action brought to compel the judge to transfer the case) *with General Tire & Rubber Co.* v. *Watkins,* 363 F.2d 87 (4th Cir.), *cert. denied,* 385 U.S. 899 (1966) (judge who had been represented by counsel for real parties in mandamus proceeding was not precluded from hearing the case); *United States* v. *Haldeman,* 181 U.S. App. D.C. 254, 559 F.2d 31 at 138-39 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977) (same). Following the 1974 revision, the prevailing view appears to be that such official representation does not require recusal. *See Century Casualty* v. *Security United Casualty Co.,* 606 F.2d 301 (10th Cir. 1979) (same); *cf. United States* v. *Zagari,* 419 F. Supp. 494, 505-06 (N.D. Cal. 1976) (representation of judge by Assistant U.S. Attorney in quashing subpoena for the judge's deposition is not grounds for recusal under 18 U.S.C. § 455).

In sum, it appears that even if the BCA judges with whose situation the foregoing Opinion is concerned were justices, judges, or magistrates of United States courts, so as to be fully subject to 18 U.S.C. §455—which they clearly are not—it is by no means likely that they would feel required to disqualify themselves from proceedings in which the inquiring lawyer was to participate, let alone ask whether other counsel consented to their presiding in such proceedings. Nonetheless, a BCA judge in such circumstances, taking

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[4]Note 2 to the Opinion, *supra,* explains why this discussion is contained in a separate statement rather than in the Opinion itself.

[5]We are not advised as to whether the agency in question has promulgated any applicable ethical standards, and we are not aware of any that are applicable throughout the Federal Government. The ethical provisions governing members of the bar, as discussed in the foregoing Opinion, offer no specific rules governing the present circumstances.

[6]Before its amendment in 1974, § 455 made a less limited reference to the judge's relationship to counsel:

> Any justice or judge of the United States shall disqualify himself in any case in which he. . . is so related to *or connected with* any party *or his attorney* as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein.

[7]The text of § 455 prior to the 1974 amendment is set out in note 6, *supra.*

that provision and the Code of Judicial Conduct as an "aspirational" model, might choose either to recuse her/himself or to give counsel notice of the circumstances and of the decision not to recuse.

Approved: March 31, 1981

Opinion No. 102

DR 9-102—Deposit of Client's Funds in Separate Accounts; Use of Interest-Bearing Accounts; Disposition of Interest

The Bar Counsel has asked us to consider several questions arising from the advent of interest-bearing checking accounts and a lawyer's obligation under DR 9-102(A) to deposit the funds of a client in one or more separate and identifiable bank accounts maintained in the state in which the law office is situated. Specifically, Bar Counsel asks:

1. Does a lawyer have the option to continue to use a non-interest account for his clients' funds or must he utilize an account which pays interest?
2. If he must utilize an account which pays interest and assuming the rates vary among institutions, must he select one which pays a rate reasonably comparable with the rate available from other "banks"?
3. What disposition is to be made of any interest received on an account? In this respect is a *de minimus* rule applicable?
4. Does the use of "bank accounts" in DR 9-102 require that the account be in a conventional bank as distinguished from a savings and loan or credit union which have accounts with characteristics similar to checking accounts?

This Committee's Opinion 36 provides substantial guidance on the first two of these questions. In that case, a law firm with an active real estate practice asked, *inter alia,* whether it is ethically proper to deposit money designated for settlement purposes in an interest bearing account. We responded that the Code of Professional Responsibility is silent on this question and that deposits in interest bearing accounts are certainly not prohibited by the Code. We also noted that "[a]s a general matter, to deposit a client's money in such a way as to earn interest for him would appear to be consistent with Canon 7, whose overall direction is that 'A Lawyer Should Represent a Client Zealously Within The Bounds of Law.'"

Although the Code neither commands nor prohibits deposits of a client's funds in interest earning accounts, we think that a lawyer should discuss with his client the advantages and disadvantages of deposits in interest bearing accounts and the various types of accounts which different banks provide. It may well be that the expenses involved in maintaining an interest earning account will exceed any interest that might be earned, particularly when the sum is small or is deposited for only a brief period. Such expense might include various bank charges and reasonable fees for bookkeeping performed by the law firm or lawyer. On the other hand, if the sum is substantial or there is a substantial period of time before the money will be disbursed, the client may wish to earn interest on the money. These are all matters on which the lawyer should fully advise the client and then be guided by the client's wishes.

If an interest earning account is established, there is no doubt that the interest must be credited to the client and cannot be retained by the lawyer, absent an agreement to the contrary. Opinions interpreting the old ABA Canon 11 unequivocally hold that interest earned on a client's funds may not be retained by the lawyer.[1] ABA Informal Opinion 545 (May 21, 1962) states that "a lawyer who received money in his capacity as a lawyer, under circumstances that required him to account to another for such money, would be acting in violation of Canon 11 should he place the money in an interest-bearing account and keep for his own use the interest earned on such account, unless he was specifically authorized to keep the interest for his own use." *See* ABA Informal Opinion 991 (July 3, 1967); Arizona Opinion 224 (May 9, 1967); 6 Arizona Bar Journal 36 (Dec. 1970); Los Angeles County Bar Informal Opinion 1961-67; Oregon Opinion 144, 24 Oregon State Bar Bulletin 10 (July, 1964); Bar Association of the City of New York Opinion 181 (March 27, 1931). Moreover, recent opinions in other jurisdictions construing DR 9-102 hold that interest earned on a client's funds must be credited to the client. *E.g.,* Massachusetts Opinion 74-6 (June 20, 1974), 50 Mass. L. Q. 298 (1974); North Carolina Opinion CPR-26 (Oct. 24, 1974), 21 North Carolina Bar Bulletin 13 (Nov. 4, 1974); Florida Opinion 72-13 (May 9, 1972), Florida Ops. 36. Even if the interest is minimal, it belongs to the client, absent an agreement to the contrary.

If interest is earned on a client's funds, DR 9-102(B) prescribes certain record-keeping and reporting practices which lawyers must follow. DR 9-102(B)(3) is especially pertinent. This provision requires that a lawyer shall "[m]aintain complete records of all funds...of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them." Compliance with this requirement with respect to interest earned on bank deposits might be very difficult and perhaps impossible unless the funds of each client are maintained in a separate account. Thus, depositing the funds of several clients in one interest bearing account would not be appropriate, unless accurate records can be maintained of each client's interest earnings.

In answer to Bar Counsel's fourth question, we think that the term bank account in DR 9-102 is sufficiently broad to include any savings institution similar to a bank. The most important factor in determining whether a savings institution is sufficiently similar to a conventional bank is whether it provides the same measure of deposit insurance as does a conventional bank. However, with the client's consent, funds could be deposited in other ways as well.

Inquiry 80-11-36

[1] Canon 11 provided: "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or used by him."

Opinion No. 103

DR 2-106; DR 2-110; DR 7-101; EC 2-19; EC 2-23; EC 2-32; EC 7-7—Retainer Agreements; Authority To Make Litigation Decisions; Withdrawal From Representation; Attorney's Lien; Finance Charges; Assignment Of Recovery; Excessive Fees

A law firm has asked us to assess the propriety of a form retainer agreement. As a prefatory matter, we note that retainer agreements are highly desirable, *see* EC 2-19, Opinions 29, 25 and 4, and we do not believe, as a general proposition, that form agreements are ethically proscribed. Indeed, there may be some matters for which they are readily suited. However, we wish to register a note of caution that form agreements may not be adequate to set forth fully and fairly the terms of representation for all legal matters or for all attorney-client relationships. Factors to be considered in determining whether a form agreement is appropriate in any particular case include (1) the complexity of the matter, (2) whether the fee arrangement is straight-forward or intricate, and (3) the client's level of education, sophistication, and experience in dealing with lawyers.

With respect to two provisions of the agreement under consideration, we find problems which require modification of the agreement. With respect to other provisions, we find no ethical defects but note that if carried to extremes or implemented without attention to the Code of Professional Responsibility, these provisions could lead to ethical problems. We also outline other provisions of the agreement and identify relevant sections of the Code or our opinions which sanction these provisions.

One section of the agreement provides: "If the matter is litigated, the firm is authorized to file such legal pleadings as their judgment dictates is required or appropriate." We think that this provision should be modified to make clear that the client has ultimate control over litigation decisions. As now phrased, this provision creates too strong an impression that the client yields all control to the firm.

The Code does not establish bright lines with respect to a lawyer's authority to make litigation decisions unilaterally. Certain pro-

visions of the Code stress client control over the essential decisions in litigation. Ethical Consideration 7-7 states:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

Disciplinary Rule 7-101(A) also reinforces the principle of client control. That rule provides: "A lawyer shall not intentionally (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules... [or] (3) Prejudice or damage his client during the course of the professional relationship...."

On the basis of DR 7-101(A) and EC 7-7, it is clear that a lawyer should not take action which would irrevocably prejudice a client's position or otherwise affect the merits of the case without the client's consent. For example, a lawyer may reach the professional judgment that a particular claim or defense should be dropped, but it would be improper for him to file pleadings to that effect without the client's consent. As we pointed out in Opinion 21, "[t]he lawyer may recommend dismissal and has an obligation to do so if in his judgment the suit is futile...but he may not dismiss without the client's consent." On the other hand, technical decisions concerning litigation strategy or tactics which require the exercise of trained professional judgment and do not affect the merits of the client's position are within a lawyer's discretion. *See* ABA Standards for Criminal Justice, Standard 4-5-2.

In contrast to DR 7-101(A) and EC 7-7, DR 7-101(B)(1) allows a lawyer to exercise considerable latitude in making litigation decisions. That rule provides that "[i]n his representation of a client a lawyer may... [w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." The difficult question under this provision is determining when it is "permissible" for a lawyer to exercise such authority. Where a lawyer fully informs a client of the client's ultimate authority and the client then chooses to delegate broad authority to the lawyer, it would be permissible for the lawyer to make fundamental litigation decisions.[1]

The difficulty with the provision in the retainer agreement under consideration is that it sets out a broad delegation of authority to the law firm without indicating that the client has been advised of his ultimate authority. We are concerned that a client presented with such an agreement may never realize that authority over litigation decisions is initially his. Accordingly, we think that this provision should be modified to avoid this danger. The law firm should take care to explain to its clients that they retain control over the litigation unless they wish to delegate authority to the firm. Since it is unlikely that many clients will wish to delegate total authority to the firm, we conclude that the present provision in the agreement is inappropriate.

Another provision of the retainer agreement provides that if the client fails to keep his bill with the firm reasonably current, "counsel may elect to terminate the representation and withdraw as counsel." When a client "[d]eliberately disregards an agreement or obligation to the lawyer as to expenses or fees," the Code permits the lawyer to withdraw representation. DR 2-110(C)(1)(f).[2] However the Code also requires that "a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules." DR 2-110(A)(2). As we emphasized in Opinion 48, "whenever an attorney withdraws, great care must be taken to avoid disruption and prejudice to the rights of the client." And in Opinion 59, we said that "the lawyer has the obligation to minimize the interference with his client's interests that may result from a change in counsel, even where a fee remains unpaid." *See* EC 2-32. Thus, the firm should keep these considerations in mind if it becomes necessary to withdraw representation because a client fails to pay his bills.

Although the section of the agreement dealing with termination of representation for a client's failure to pay bills is by itself permissible, we think that the agreement as a whole is defective because it sets forth only the grounds on which the law firm may terminate. We are concerned that as presently written the agreement creates an impression that the client has entered into a relationship that from his point of view is irrevocable. Thus, we believe that when a retainer agreement sets forth the conditions on which a law firm may withdraw from the representation, it should also make clear that the client has the authority to discharge the firm.

As a general matter, we note that EC 2-23 urges that "[a] lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject." Furthermore, this Committee has stated in earlier opinions that "the attorney bears the responsibility for seeing that there is no likelihood of misunderstanding as to fee arrangements." Opinions 29, 25, 4. The preparation of a written retainer agreement is an important step in accomplishing these goals. However, even though the agreement sets forth the conditions under which the firm may withdraw from representation because of a client's failure to pay bills, the firm should still be zealous in avoiding such a rupture.

In the event that the firm withdraws its representation because the client fails to pay bills, the retainer agreement provides that the firm shall have an attorney's lien on the file. In Opinion 59 we decided that assertion of such liens generally are ethically permissible but that there are circumstances where assertion of a lien would be impermissible. Accordingly, the firm should study that opinion before exercising its rights under this provision of the retainer agreement.

The agreement also provides that the firm may charge a monthly service charge of 1.5 percent on any bill more than thirty days overdue. In Opinion 11, we stated that this practice is a departure from the custom of the legal profession and that "[w]e do not advocate the charging of interest on unpaid legal fees." Nonetheless, we found that such charges do not violate the Code, provided that there is clear agreement by the client prior to the representation or prior to a new stage of representation. Here the retainer agreement satisfies that caveat.

Also with respect to payment of fees, the agreement states that "if any monies are deposited into the Registry of the Court or collected by the firm, any outstanding fees or costs may be deducted from same by the firm and only the net remitted." In Opinion 37, we found no ethical problem in a retainer agreement which assigned funds from a recovery to the attorney to pay for fees, and this agreement is substantially similar. We note, however, that whether funds deposited in a court registry can be withdrawn is often a legal question over which the client and the lawyer have no control.

The retainer agreement further provides that the client pays a non-refundable minimum fee against which costs and fees will be billed. The amount of the fee is specified for each case. Under certain circumstances, such a "non-refundable minimum fee" could violate DR 2-106(A) which provides that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal

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[1] This opinion does not purport to catalogue all the circumstances in which a lawyer's unilateral decisionmaking is permissible under DR 7-101(B), but only to apply that provision to the retainer agreement under consideration. DR 7-101(B) is a troublesome section of the Code, and we leave further interpretation to inquiries presenting more concrete factual situations than we have here.

[2] If a matter is pending before a court of other tribunal, the lawyer must comply with any applicable rules regarding withdrawal. DR 2-110(A)(1).

or clearly excessive fee." For example, the firm might agree to represent a client in a divorce proceeding that appears likely to be a bitter and protracted battle. Under these circumstances, it would not be unreasonable for the firm and the client to agree on a substantial advance deposit. However, if a few days later—before any significant work has been performed—the husband and wife are unexpectedly reconciled, it would be improper for the firm to keep the entire advance deposit because it would be collecting a clearly excessive fee in light of the little work performed. *See* DR 2-106(B)(1). Accordingly, the firm should be careful that non-refundable minimum fees do not constitute clearly excessive fees.

The retainer agreement also sets out the hourly rate at which fees will be charged by partners, associates, paralegals, and law clerks, and stipulates that a minimum billing segment of two-tenths of an hour for telephone conferences and letters may be employed.[3] The agreement also provides that the fee schedule may be revised one year from the date of the agreement upon notice to the client. These agreements do not offend any provision of the Code, and we mention them primarily to emphasize once again the desirability of putting fee arrangements in writing. *See* Opinions 29, 25 and 4; EC 2-19.

Inquiry 81-1-2

Opinion No. 104

DR 5-101(A); DR 5-103(B); DR 6-101; DR 7-101—Obligation Of Lawyers To Accept *Pro Bono* Appointments; Excessive Appointments To *Pro Bono* Cases; Duty Of Lawyer To Advance Litigation Expenses For Indigent Clients; Duty To Decline Appointments That Cannot Be Competently And Zealously Performed

We have been asked to render an opinion on questions raised by the appointment of lawyers in indigent cases in the Family Division of the Superior Court of the District of Columbia. The inquiry comes from an attorney who has been appointed to a substantial number of delinquency cases and neglect cases in the Division, for which no compensation is available. The attorney also advises that he is a member of the Family Division Trial Lawyers' Association and that many members of that group share his concerns.

Synopsis

(1) The Committee concludes that the Bar in general as well as individual lawyers ha the professional duty to make counsel available to indigents. The courts may appoint a lawyer to represent an indigent without compensation, and the lawyer is ethically obliged to accept the appointment unless he is carrying a disproportionate share of indigent representations.

(2) Under certain circumstances, a lawyer may be ethically obliged to object to further uncompensated appointments.

(3) When a lawyer undertakes to represent an indigent client, his basic ethical duties to render diligent and competent professional services are the same as those owed to a paying client, and these duties may require the lawyer to incur unrecoverable out-of-pocket expenses.

Issues

The inquiry raises a number of specific questions concerning the appointment practices of the Superior Court and the duty of lawyers to accept those appointments. We are asked to define the responsibility, if any, of a member of the District of Columbia Bar to accept mandatory *pro bono* appointments. The inquiry then asks whether a lawyer has a responsibility to accept *pro bono* appointments in "neglect" cases in the Family Division, specifically, whether the lawyer's registration to volunteer for compensated appointments under the Criminal Justice Act in the Juvenile Branch of the Family Division legitimately subjects the lawyer to a substantial number of uncompensated appointments in the neglect cases.

The inquiring attorney also asks whether there is any standard that would establish the proper ratio between uncompensated "neglect" appointments and the number of appointments to "juvenile" cases for which compensation is available under the Criminal Justice Act. The inquiry also asks whether an excessive number of uncompensated *pro bono* appointments would raise issues of abuse of discretion or unconstitutional "taking."

Beyond these questions about the obligation to accept appointments to various uncompensated cases, the inquiring attorney wants us to define the proper conduct of lawyers appointed to these cases. Specifically, we are asked whether the lawyer has an affirmative obligation to handle these proceedings in the same way that any other civil matter would be handled. For example, must the lawyer conduct written interrogatories, take depositions, conduct investigations or hire expert witnesses? To the extent that any of these functions must be performed, the inquirer asks whether the lawyer is obliged to pay for these expenses out of his or her own pocket.

Finally, the inquiring lawyer asks whether the District of Columbia Bar has any general responsibility for handling *pro bono* representation and whether some sort of insurance fund should be established to finance the handling of these cases.

Discussion

Many of the questions are beyond the purview of the Legal Ethics Committee. In an effort to provide some guidance on the ethical issues raised by the inquiring attorney, however, we have divided our discussion into four segments. The first describes the system for appointing counsel. The second traces the general obligation of lawyers to provide legal services to indigents. The third involves the responsibility to decline appointments under some circumstances. And the fourth examines the nature of an attorney's obligations once he does undertake a representation.

1. *The System for Appointment of Counsel.*

All members of the Bar and all members of the community should be aware of the need for quality professional representation of indigents involved in legal proceedings. The Supreme Court has squarely held that, in criminal proceedings at least, the courts have an affirmative constitutional obligation to provide counsel to indigents.

In the District of Columbia, this obligation is met in the Criminal Division of the Superior Court through two mechanisms: (a) assignment of lawyers employed by the Public Defender Service, an organization created by Congress and funded by public appropriations and (b) appointment of private lawyers who register for such cases and are compensated on an hourly basis under the Criminal Justice Act (District of Columbia Code § 11-2601 *et seq.*) Both mechanisms are also utilized in the Juvenile Branch of the Family Division, where the charges are essentially criminal in nature but the accused is a minor.

So-called "neglect" cases involve allegations that a youngster is not being properly cared for by his parents or has been abused by them. They are regarded as civil matters, since the remedies available to the Family Division judges do not include criminal penalties. Thus, the indigent parents who are charged with neglect do not qualify for assignment of *compensated* counsel under the Criminal Justice Act.

Nevertheless, there is some support for the proposition that indigent parents have a constitutionally protected right to appointed counsel before a court may terminate their parental rights. *See, e.g., Department of Public Welfare* v. *J.K.B.*, 393 N.E. 2d 406, 408 (Mass 1979), and cases cited. Such a right is created by statute in this jurisdiction. The District of Columbia Code provides in § 16-2304:

> "(b) When a child is alleged to be neglected, *the parent, guardian, or custodian of the child* named in the petition *is entitled to be represented by counsel* at all critical stages of the Division proceedings *and, if financially unable to obtain adequate represenation, to have counsel appointed* in accordance with rules established by the Superior Court. The Division shall, where appropriate, appoint sepa-

[3]The rates fixed in the agreement—$75 per hour for partners, between $30 and $60 per hour for associates, depending on the attorney and the degree of difficulty of the work, and $20 per hour for paralegals and law clerks—plainly are not "illegal or clearly excessive." DR 2-106(A).

rate counsel to represent the child, as provided in section 16-918." (Emphasis added.)

This unusual statutory right to appointed counsel in neglect proceedings is implemented by Superior Court Neglect Rule 20, which requires that *all* parties, including the child, are to have to counsel at all stages. Counsel are to be assigned when the parties are financially unable to retain lawyers.

Since no funds have been appropriated to pay assigned counsel, the judges handling these cases regularly appoint as uncompensated counsel for the indigent parents the lawyers who request CJA appointments in the Juvenile Branch.[1] This practice reflects the court's understandable desire to draw on an available "pool of attorneys experienced in family law...." (*In re Parker,* No. N-464-79, 109 Daily Wash. L. Rep. 573, 578) (D.C. Sup. Ct., February 24, 1981).

The premise of the inquiry before us is that lawyers who accept cases for the modest compensation permitted under the Criminal Justice Act are being ordered to undertake an excessive number of uncompensated representations in neglect cases. It is said that the one hundred or so lawyers involved in these cases average thirty uncompensated appointments per year, consuming hundreds of hours of professional time. *See* Letter from David J. Sitomer, District Lawyer, Nov./Dec. 1980, at 20-22.

The Director of Public Service Activities of the District of Columbia Bar has recently written: "The child neglect appointment situation in the District is an example of *pro bono* run amok. The *pro bono* burdens imposed on many Family Division lawyers cannot be justified." Z. Hostetler, *Crisis in Child Neglect Cases, District Lawyer,* April 1981, at 10.

In a preliminary phase of a challenge to the validity of this system, one judge has relieved counsel of all but ten of his twenty-seven neglect appointments. *In re Parker, supra,* 109 Daily Wash. L. Rep. at 579. In that decision, the court found that the burdens imposed on this group of counsel may no longer be "tolerable" and that "the present system of appointment is rapidly approaching an unacceptable and potentially unconstitutional state." *Id.* at 578, 579.

The judge serving as the Administrative Head of the Family Division has confirmed that the "biggest problem" facing the Division is the lack of funding to compensate these appointed counsel. *See A Look at Judge George H. Goodrich,* District Lawyer, Sept./Oct. 1980, at 53, 59. A recent report prepared for the District of Columbia Bar concluded:

> "The system for parental representation in child neglect cases is shameful and inexcusable. Counsel for parents are drafted on an involuntary basis....As these cases stay in the system for years, many of the attorneys have very high neglect caseloads. The result of this situation is that the quality of representation of parents is very low although the societal cost and the stakes for all concerned are higher than in many criminal cases for which paid counsel is available." D.C. Court System Study Comm. of the D.C. Bar, *Juvenile and Child Neglect Report* 35, 36, December 17, 1980.

At the threshold, the inquiry poses an issue about compliance with the order of courts acting within their jurisdiction. In significant measure, this aspect of the problem involves a question of law that is beyond the competence of this Committee to address. Ethically, of course, a lawyer owes a duty to the legal system, and is obliged to show respect for judicial rulings. Nevertheless, as EC 7-22 makes explicit, it is ethically proper for a lawyer to test a judicial ruling which he believes in good faith to be erroneous. Therefore, there is no ethical stricture that would prevent a lawyer from challenging, through proper judicial channels, any appointment that the lawyer believes is unwarranted.

2. *Responsibility of Legal Profession To Provide Legal Services to Indigents.*

We begin by noting the general principle that the legal profession has a responsibility to make legal services available. *See* EC 2-1. The annotations to the Code quote this worthwhile observation by Professor Cheatham:

> "[T]here is a responsibility on the bar to make legal services available to those who need them. The maxim, 'privilege brings responsibilities,' can be expanded to read, exclusive privilege to render public service brings responsibility to assure that the service is available to those in need of it." *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar,* 12 U.C.L.A. L. Rev. 438, 445 (1965).

Virtually every court to address the problem has held that the courts have power to assign counsel to represent indigents when necessary, even without a fee. As the Supreme Court of Alabama noted in rejecting constitutional challenges to such appointments: "Representation of indigents upon court order is an ancient tradition of the legal profession, dating back to the fifteenth century in England and to pre-Revolutionary America." *In re Sparks,* 368 So.2d 528, 532 (Ala.), *appeal dismissed,* 444 U.S. 803 (1979). While we recognize that it is in the highest tradition of the legal profession for lawyers to fulfill an obligation to represent indigents, we nevertheless are confident that the full weight of this burden cannot fairly be placed on the shoulders of a small group of practitioners. *See, In Re Parker, supra,* 109 Daily Wash. L. Rep. at 579. *See also,* ABA Informal Opinion 1216 (April 4, 1972), discussing the 1971 stand-by plan for appointment of counsel in this jurisdiction, under which "the burden of serving as appointed counsel...[was to be] equalized among all members of the bar."

The Ethical Considerations recognize that the responsibility to provide legal services to indigents is a dual obligation, involving individual lawyers as well as the organized bar. EC 2-25 states: "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer...." The Ethical Consideration continues: "The rendition of free legal services to those unable to pay reasonable fees continues to be an *obligation* of each lawyer...." (Emphasis added.) Nevertheless, the Consideration recognizes that "the efforts of individual lawyers are often not enough to meet the need" and that it is "necessary for the profession to institute additional programs to provide legal services."

A generally adequate level of professional remuneration is a corollary to these responsibilities. After EC 2-16 declares that "persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services," it recognizes that, as a practical matter, the legal profession cannot remain a viable force "unless its members receive adequate compensation for services rendered...." These observations simply reflect an evident point: Lawyers will not be available to render uncompensated services to indigents unless they receive sufficient compensation from other matters that they handle. This practical truism applies, we believe, to lawyers who are willing to accept Criminal Justice Act appointments in the Superior Court.

The Bar of the District of Columbia recognizes these interrelated principles. On June 5, 1980, the Judicial Conferences of the District of Columbia adopted this two-part resolution:

> "RESOLVED that every lawyer has a professional responsibility to budget a portion of his or her time for *pro bono* legal service without fee to persons financially unable to retain counsel; and
>
> "FURTHER RESOLVED that every lawyer should fulfill that responsibility each year, at a minimum, by (1) accepting one court appointment, or (2) providing 40 hours of *pro bono* legal service, or, when personal representation is not feasible, (3) contributing the lesser of $200 or 1% of earned income to a legal assistance organization which serves the community's economically disadvantaged, including *pro bono* referral and appointment offices sponsored by the bar and the courts. Quoted in Ferren, *Guidelines for Budgeting Pro Bono Legal Service, District Lawyer,* Sept./Oct. 1980, at 28.

Among the annotations in the Code of Professional Responsibility is a citation to the 1963 Report of the Attorney General's

[1] The children in such cases are represented by student attorneys from law school clinics and by private attorneys coordinated by the Court's Volunteer Attorneys Office; some of these attorneys receive modest compensation through funds made available under a three-year grant from the United States Department of Health and Human Services, and others volunteer their services. In addition, the representation of some of the parents is undertaken by the Legal Aid Society pursuant to a grant from the District of Columbia Bar Foundation.

Commission on Poverty and the Administration of Justice. That Report states at 41-43:

> "The Committee is persuaded...that a system of justice that attempts, in mid-twentieth century America, to meet the needs of the financially incapacitated accused through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate....A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance...."

We believe that this observation applies equally to representation of indigent parents and children in neglect proceedings. The need for appointed counsel is, evidently, more than occasional. One commentator has written that there are approximately 3,000 neglect hearings a year, for which between 6,000 and 10,000 lawyers are needed to represent the various parties. Z. Hostetler, *supra, District Lawyer,* April 1981, at 10.

Since the District of Columbia Code and local court rules require the appointment of counsel for indigents in neglect proceedings, some more comprehensive solution must be found beyond placing the burden of this representation on a small group of practitioners representing other indigents in the same court. The responsibility belongs to the courts, to the Bar, and to the elected branches of government to see to it that adequate funding is provided to guarantee the availability of competent counsel. *See In Re Parker, supra,* 109 Daily Wash. L. Rep. at 578-79; *In Re Sparks, supra,* 368 So.2d at 533-34, and cases cited. Uncompensated appointments that are grossly in excess of the standards suggested in the Judicial Conference resolution would, in our view, go beyond any individual lawyer's ethical responsibilities.

The stated goal of the legal profession to make lawyers' services generally available, including to those who are not in a position to pay for them, is not cast in the form of a Disciplinary Rule that is ethically *binding* on individual lawyers. It is a statement of a worthwhile objective that all lawyers should work toward achieving.[2] As a result, the Code does not provide a basis for discipline for failure to undertake a *particular* representation of an indigent. The Code expects the lawyer to provide some *pro bono* representation to indigents. This general duty becomes concrete when a court validly orders counsel to undertake the representation.[3]

3. *Duty To Decline Representation Under Certain Circumstances.*

By contrast, the Disciplinary Rules do impose ethical obligations that, in certain circumstances, may make it improper for a lawyer to undertake the representation of a particular indigent, even upon assignment by a judge. The interplay of three Disciplinary Rules suggests that a lawyer is obliged to decline to accept appointments to represent indigents.

Under Disciplinary Rule 6-101(A), a lawyer is forbidden to undertaken a matter that he knows he will not be competent to handle. Competence in this context means, primarily, the substantive knowledge and procedural skills to handle a particular matter. We believe, however, that the same principle applies when the lawyer is aware that his other obligations, including legitimate obligations to his own practice and other *pro bono* activities will make it impossible or unreasonably difficult to handle an additional matter properly.

This conclusion is reinforced by DR 7-101, which requires that a lawyer represent his clients zealously. While this obligation does not necessarily mean that a lawyer must represent an indigent in precisely the same manner in which he would represent a wealthy client, it does impose a similar duty of diligent and vigorous representation. The discharge of this obligation may not be possible when a significant percentage of the lawyer's professional undertakings are for indigents on whose behalf he receives no compensation.

In reaching this conclusion we are also guided by the express terms of DR 5-105(A), which provides that a lawyer shall not accept employment "if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial...interest." This Disciplinary Rule embodies a rather practical recognition that a lawyer who is distracted by his own personal financial concerns is unlikely to be a competent or effective advocate for a client. In our judgment, the danger against which this Disciplinary Rule is intended to guard is presented (1) when a lawyer who is already involved in *pro bono* activities is ordered or induced to accept an additional representation of non-paying clients and (2) when this additional representation would impose a substantial financial burden—such as through the incurring of unreimbursable out-of-pocket expenses—or would demonstrably and materially impair the time available to represent paying clients on whom the lawyer depends for his livelihood. *See* EC 2-16.

Under these circumstances, we conclude that, before accepting another appointment to represent an indigent without compensation, a lawyer who is already doing *pro bono* work must exercise his best professional judgment to determine whether he will be able to render competent and effective service to that new client. This obligation exists even when an appointment from a court is at issue. A lawyer has an obligation to respect a court order appointing the lawyer to represent an indigent, but he is under an independent obligation to make known to the court his belief that he cannot competently and effectively represent an additional non-paying client. If the court nevertheless orders him to accept an additional appointment, the lawyer is ethically free—and may be ethically obliged—to challenge that decision.

We hasten to add that a lawyer should not lightly resist a request from the court that the lawyer assist in coping with a serious community problem. As EC 2-29 cautions:

> "When a lawyer is appointed by a court—to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation *except for compelling reasons.*" (Emphasis added.)

This standard is necessarily a stringent one. The lawyer may object to a further appointment or seek to be excused from an appointment only: (1) if he concludes, after serious reflection, that present or recent representations of indigents on whose behalf no compensation is available make it unreasonably difficult for him to bear the burdens of further non-paying representation, and (2) if he is prepared to document these hardships to the satisfaction of the court.

4. *Obligations to Indigents Upon Accepting Appointments.*

As we have suggested, a lawyer's basic ethical obligations to a client are fundamentally the same, whether the client has retained him or is receiving legal services without compensation. Specifically, the requirements of DR 6-101 and 7-101 requiring competent and diligent representation apply in both categories. *Cf. Ferri* v. *Ackerman,* 444 U.S. 193, 200 (1979), denying malpractice immunity to counsel appointed to represent an indigent under the Criminal Justice Act, on the ground that "Congress intended all defense counsel [appointed or retained] to satisfy the same standards of professional responsibility...."

The inquiry asks whether a lawyer handling a neglect proceeding for an indigent must handle it in the same way that any other civil proceeding would be handled, such as by the taking of depositions, putting interrogatories, hiring investigators or ex-

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[2] *Compare* the proposed requirement of the "Kutak draft" of a revised Code: "A lawyer *shall* render unpaid public interest legal service...." ABA Commission on Evaluation of Professional Standards, *Model Rules of Professional Conduct* (draft) Rule 8.1 at 118 (January 30, 1980). (Emphasis added.)

[3] We do not attempt to catalog the constitutional or legal objections that a lawyer may have to a particular plan for appointment of counsel.

[4] *Compare* ABA Informal Opinion 1216, *supra,* concluding that the 1971 stand-by plan for appointing counsel to misdemeanor cases in this jurisdiction did not violate DR 6-101(A) because even non-criminal specialists should be able to handle misdemeanor cases competently. The ABA committee did not address the status of another feature of that plan: the provision that a lawyer would not be excused from an appointment on the basis of a "contention that he cannot afford the loss of time or income caused by the acceptance of such appointment."

perts, etc. The answer to this question in the abstract is, yes. If, in the exercise of the lawyer's best judgement, the use of those procedures would be necessary to the conduct of an adequate representation, he would be obliged to use them.[9]

The inevitable question, raised by the inquiry, is: Who pays? The answer to this question under the present Code is one that we reach with some diffidence, because there are conflicting signals to guide us. DR 5-103(B) of the present Code is explicit in providing that, if a lawyer advances the expenses of litigation, the client must nevertheless remain obligated for them. In the case of indigent representation, the theoretical obligation of the client is likely to be illusory. There is no express exception for indigents, although some have suggested that lawyers should be *permitted* to assume responsibility for litigation costs when they agree to represent indigents. This Committee and the Board of Governors have so recommended to the Court of Appeals in seeking an amendment to the Code on this subject.

The practical question now before us is somewhat different: Is a lawyer who is appointed to represent an indigent *obliged* to assume substantial out-of-pocket costs for which he has no chance of reimbursement? Nothing in the Code is explicit in requiring the lawyer to do so. Indeed, EC 5-8, generally discourages lawyers from advancing costs to clients. In our Opinion No. 21 this Committee expressly held that, in the absence of agreement to do so, a lawyer does not have an ethical obligation to advance the costs of litigation, even when the client is of "modest means" and may not otherwise be able to advance the costs necessary to continue to press a litigation. *See also* Opinion No. 89, permitting withdrawal of representation because of a client's unwillingness to pay costs and fees.

Normally, of course, a lawyer's voluntary acceptance of the representation of an indigent carries with it the understanding that he will advance the costs necessary for adequate representation. Where, however, the representation is not the result of voluntary choice, but of a direction from the court, is there a similar, implicit undertaking? We conclude that there is. When a lawyer accepts an assignment in accordance with his professional responsibility to render such service, his professional duties to his indigent client under DR 6-101 and DR 7-101, as discussed above, oblige him to advance the expenses necessary to competent representation. This duty means that, as a practical matter, the lawyer will have to absorb those expenses whenever there is no mechanism for reimbursing him.

[9]We do not mean to suggest that a lawyer representing an indigent is obliged to expend all the resources that might be committed if cost were no concern. Even in the representation of paying clients, lawyer and client exercise discretion on how far to go. Cost is a legitimate and common constraint in making tactical decisions.

Conclusion

It has not been possible for the Committee to answer some of the specific questions raised by the inquiry concerning ratios of paying to non-paying appointments, and other similar matters. In applying the principles that we have described above, each lawyer must evaluate the circumstances in which he finds himself. Little will be served by needless confrontation with the judiciary. The lawyer should keep uppermost in his mind that he is a member of a public profession. In that capacity, he has a responsibility to render service to those who require his professional assistance, even if they are not financially able to pay for it.

We conclude, nonetheless, that a lawyer has no ethical obligation to accept more than his fair share of non-paying indigent clients. In the circumstances described in Part 3, he may have an ethical obligation to object to additional assignments.

Inquiry No. 80-12-37
Approved: April 21, 1981

Opinion No. 105

DR 2-101, DR 2-103(C), DR 3-101(B)—Propriety of Multijurisdictional Newspaper Advertisements and Letters of Solicitation By Attorneys

We have received three inquiries from attorneys who are licensed to practice law and whose law offices are situated in the District of Columbia concerning the propriety of multijurisdictional letters of solicitation and newspaper advertisements. The specific questions raised by each are as follows:

1. Whether attorneys may mail letters of solicitation to residents of the District of Columbia, Maryland and Virginia.

2. Whether attorneys may place advertisements announcing their availability to handle problems with D.C.-based federal agencies in newspapers published outside of the District of Columbia which reach readers in multiple jurisdictions.

3. Whether attorneys may place advertisements in a newspaper published in the District of Columbia which is also circulated to readers in other jurisdictions.

4. Whether, in the event that a person residing outside the District of Columbia responds to the advertisement, an attorney may represent the prospective client if he or she affiliates with a co-counsel who is licensed to practice law in the jurisdiction within which the prospective client resides.

5. Whether, if the newspaper is read in jurisdictions A, B and C, and if the advertisement states in part:

> Contact Attorney X, phone no., address. In jurisdiction C, contact Attorney Y, phone no., address.

the text would imply improperly that attorney X is licensed to practice law in jurisdictions A and B.

6. Whether the two attorneys X and Y may share the costs of this advertisement.

7. Whether attorney X may charge attorney Y a fee beyond the share of its costs for inclusion in the advertisement.

In summary, our conclusions are that under the District of Columbia Code of Professional Responsibility: (1) attorneys may send letters of solicitation to persons outside the District of Columbia; (2) attorneys may place advertisements in newspapers wherever published which are circulated outside of the District of Columbia; (3) attorneys may represent prospective clients who respond to such advertisements even if the work is performed in another jurisdiction so long as the representation is consistent with the regulations of the profession of the other jurisdiction; (4) the text of the specific advertisement presented does not necessarily imply that Attorney X is licensed to practice law both in jurisdictions A and B and does not violate DR 2-101; (5) two attorneys may share the costs of an advertisement; (6) one attorney may not charge a fee in addition to a share of the cost of the advertisement to include a second attorney's name and telephone number in an advertisement.

We will address the questions raised in more detail below. However, we note at the outset that in reviewing each of the questions, we will limit our consideration to whether the conduct postulated would place a lawyer in violation of the District of Columbia Code of Professional Responsibility. We do not interpret the requirements of the profession of other jurisdictions which might assert an interest in the conduct in question.

The Propriety of Mailing Letters of Solicitation or Placing Advertisements in Newspapers Published Either In or Outside of the District of Columbia Which Reach Readers Outside of the District of Columbia

DR 2-101 of the Code of Professional Responsibility sets forth the general requirements governing publicity and advertising. In Opinion 91, we determined that mass mailings fall within the category of attorney advertising and, like media advertisements, are subject to the restrictions of DR 2-101. Therefore, for purposes of analysis, we will treat together the inquiries concerning letters of solicitation and newspaper advertisements.

The terms of DR 2-101 set forth a variety of standards and conditions which publicity and advertising must meet in order to be consistent with the Code of Professional Responsibilty. However, there are no geographical limitations within those standards and conditions.[1] Given the omission of geographical limitations within the District of

[1]Unlike the text of the District of Columbia's DR 2-101, the ABA Canons DR 2-101(B) contain geographical limitations on publicity. DR 2-101(B) of the ABA Canons states:

Columbia version of DR 2-101, we conclude that a lawyer will not violate the District of Columbia Code of Professional Responsibility simply by mailing letters of solicitation outside of the District of Columbia, or by placing advertisements in newspapers published either in or outside of the District of Columbia which read readers in multiple jurisdictions.

We recognize that not all jurisdictions would necessarily reach a similar conclusion in interpreting their requirements as applied to advertisements. Moreover, we note that DR 3-101(B) of the District of Columbia Code requires that:

> A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

However, we do not believe that advertising alone constitutes the practice of law. Therefore, the provisions of DR 3-101(B) of the D.C. Code would not be violated even were the advertisements to constitute a violation of another jurisdiction's requirements.

Representation of Clients Who Respond to Multijurisdictional Solicitations

One inquiry raises the question of whether the attorney may represent a person located outside of the District of Columbia who responds to the advertisement, so long as the attorney affiliates with a co-counsel licensed to practice law in the client's jurisdiction. This inquirer does not indicate the nature or location of the legal work to be performed, but we assume that the representation pertains to matters within the client's jurisdiction.

Assuming that the representation will take place outside of the District of Columbia, the applicable general principle is found in DR 2-101(B), prohibiting the practice of law in a jurisdiction in violation of that jurisdiction's regulations of the profession. However, EC 3-9 also provides in relevant part:

> In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

In the absence of any information from the inquirer regarding the regulations of the jurisdiction in which the client resides and their application to the representation at issue, we cannot respond definitively to the question as posed. We have no way of knowing whether the representation of a client, even with a local co-counsel, will comply with all regulations in every jurisdiction outside of the District of Columbia. Nonetheless, we would expect that in most instances, given the admonition of EC 3-9, no regulations would be violated, especially when a local co-counsel is retained.

Text of the Advertisement

One inquirer posits an advertisement placed in a newspaper circulated in three jurisdictions which states in part "contact Attorney X, phone no., address. In jurisdiction C, contact in jurisdictions A and B. We conclude that the advertisement does not necessarily contain that implication, and does not violate the requirements of DR 2-101.

DR 2-101 provides:

> *"Publicity and Advertising*
>
> (A) A lawyer shall not knowingly make any representation about his or her ability, background or experience or that of the lawyer's partner or associate, or about the fee or any other aspect of a proposed professional engagement that is false, fraudulent, misleading or deceptive, and that might reasonably be expected to induce reliance by a member of the public.
>
> (B) Without limitation a false, fraudulent, misleading, or deceptive statement includes a statement or claim which:
>
> (1) Contains a material misrepresentation of fact;
>
> (2) Omits to state any material fact necessary to make the statement, in light of all circumstances, not misleading;
>
> (3) Is intended or is likely to create an unjustified expectation;...
>
> (6) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive...."

EC 2-10, supplementing DR 2-101, provides that "[a]ll publicity should be evaluated with regard to its effect on the layperson with no legal experience."

The question then is, with the EC 2-10 standard in mind, whether an advertisement reaching many unsophisticated readers in several jurisdictions is misleading if it does not indicate the jurisdictions in which the attorney is licensed to practice law; or in the case of the advertisement before us, does the advertisement's reference to a lawyer in a specified jurisdiction imply that the second lawyer is licensed to practice in the remaining jurisdictions where the advertisement is circulated.

We do not believe that in multijurisdictional advertisements, DR 2-101 requires in all circumstances that information be included on the jurisdictions in which attorneys are licensed to practice law. The absence of the licensing information does not necessarily create a misleading impression or unjustified expectation.[2] Moreover, although licensing information may be of help to some readers, its relevance to all readers is subject to question. For example, a layperson might well be ill-equipped to determine the jurisdiction in which his or her legal matter should be handled. Therefore, the jurisdiction where the attorney is licensed to practice may not be of primary importance at the time of an initial contact. Further, a layperson may misunderstand the implications of licensing, and assume that the lawyer cannot do any legal work outside of the jurisdiction in which he or she is licensed. Such a reader may be unaware of the practice of associating with a local co-counsel, or making other arrangements which would allow representation to be provided by attorneys even if they are not licenses to practice law in the relevant jurisdiction.

Given our view that attorneys need not necessarily indicate the jurisdictions in which they are licensed to practice law, the question then arises as to whether, in the case of the text before us, that information is required. Because the proposed advertisement states that in jurisdiction C Attorney Y should be contacted, the misleading implication might arguably arise that Attorney X is licensed to practice law in both jurisdictions A and B. However, we do not believe that such an implication is necessarily present. We would expect that because Attorney Y's address is given, presumably in jurisdiction C, coupled with the directive that in jurisdiction C, Y should be contacted, the impression will be given that Attorney Y is licensed to practice law in jurisdiction C. However, it does not necessarily follow that the impression will also be given that Attorney X, whose address in jurisdiction A is provided, is licensed to practice law not only in jurisdiction A but in jurisdiction B as well. A reader might conclude instead that neither attorney is licensed to practice in jurisdiction B. Were the full text of the advertisement to create a different impression, for example, with references to jurisdiction B, a statement of the fact that Attorney X is licensed to practice law only in jurisdiction A might well be required. But on the basis of the partial text we have been given, we cannot find that it violates the requirements of DR 2-101.

Financial Arrangements Among Attorneys for Newspaper Advertisements

Two questions are raised concerning the propriety of financial arrangements made

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In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides....

[2]Of course, the full text of an advertisement might create a false impression as to where an attorney is licensed to practice law, which would require clarification. For example, it might be misleading to provide an address where the attorney is not licensed to practice law, unless the advertisement expressly indicated that fact.

between Attorneys X and Y, who are both mentioned in the newspaper advertisement. The first is whether Attorneys X and Y may share the cost of the advertisement. We find nothing in the Code of Professional Responsibility which would prohibit the attorneys from sharing the costs of the advertisements. Moreover, DR 2-103(C) allows lawyers to pay for public communications permitted by DR 2-101.

The second question posed, however, is more troubling. The inquirer asks whether Attorney X may charge Attorney Y a fee for including the latter's name and telephone number in the advertisement which is presumably greater than reimbursement for a share in the cost of the advertisement. DR 2-103(C) provides:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his or her employment by a client, or as a reward for having made a recommendation resulting in his or her employment by a client, except that he or she may pay for public communications permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

The payment of a fee to Attorney X by Attorney Y for including his or her name in the advertisement is in fact compensation for a recommendation or securing of employment in direct contravention of DR 2-103(C). Because no lawyer referral service is involved, the conduct is prohibited by DR 2-103(C).

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We conclude therefore, that under the District of Columbia Code of Professional Responsibility, multistate publicity is acceptable, and that depending on the text of the advertisement, attorneys need not necessarily inlcude the jurisdictions in which they are licensed to practice law. Attorneys may represent clients in other jurisdictions, so long as they comply with the professional regulations of the jurisdiction. Further, we find that two attorneys mentioned in an advertisement may share its costs, but that one attorney may not charge the second a fee for inclusion in the advertisement.

Inquiries 80-7-26; 80-7-27; 80-9-30

Opinion No. 106

DR 9-101(B); DR 4-101; DR 5-105—Applicability to Rulemaking of Restrictions on Employment of Former Government Attorneys

We have been asked by a staff attorney for a federal government agency whether a former, high-level agency employee, who had substantial responsibility for the promulgation of an agency rule, may now ethically represent a private party seeking to challenge the validity of that rule. Disciplinary Rule 9-101(B) of the District of Columbia Code of Professional Responsibility prohibits a former public employee from representing a private client in connection with a matter for which the former employee had substantial responsibility, but that provision has been construed to be inapplicable in the context of rulemaking. Accordingly, we conclude that the representation described in the inquiry is not prohibited by DR 9-101(B). However, such representation may effectively be precluded by DR 5-105 which requires the independent exercise of an attorney's judgment on behalf of the attorney's client, and DR 4-101, which prohibits the use of client confidences and secrets in a way that disadvantages former clients.

The Inquiry

The inquirer, a staff attorney for a federal agency, has been asked to formulate a position concerning the proper agency response to situations in which a former agency attorney undertakes to represent a private party in connection with a challenge to the validity of a rule for which the attorney had substantial responsibility during the promulgation process. The inquiry is based upon an actual fact situation presently confronting the agency. However, because of the recent change in presidential administrations, and the movement of employees in and out of government which normally accompanies such changes, the agency appears to anticipate being confronted with similar situations in the future. As a result, the inquiry has been stated in hypothetical terms, and the facts particular to the situation with which the agency is presently confronted have not been disclosed. In view of the narrowness of the ethical question actually presented and the basis of our disposition, we believe that we are able to respond to the inquiry as presented, without additional facts.[1]

In the process of formulating a proposed agency response to the hypothetical situation described in the inquiry, the inquirer has ascertained that the criminal prohibitions of 18 U.S.C. § 207, as well as the Code of Professional Responsibility, have some potential bearing upon the problem with which the inquirer is concerned. Section 207 of Title 18, and the regulations promulgated pursuant to that provision which are contained in 5 CFR Part 737, impose criminal sanctions for certain conflict-of-interest activities engaged in by former government employees. The inquirer himself has carefully considered the effect of those statutory and regulatory provisions on the situation presented in the inquiry, and has concluded that they do not prohibit the conduct at issue.[2] In accordance with our Rules, we express no opinion on the proper interpretation of those provisions.[3] However, the inquirer has also advanced an interpretation of DR 9-101(B) as it relates to his inquiry, and he has asked us for what he characterizes as a more definitive interpretation of the Code of Professional Responsibility as it relates to the facts of his inquiry.

The inquirer believes that, even though 18 U.S.C. § 207 does not prohibit the hypothetical employment at issue, that employment is prohibited by DR 9-101(B). The inquirer notes that DR 9-101(B) prohibits a former public employee from representing a private client in connection with a matter for which the former employee had substantial responsibility while he or she was a public employee. The facts of the hypothetical situation presented by the inquiry assume that the former employee had "substantial responsibility" in connection with the promulgation of the hypothetical rule at issue, and that the only issue presented for resolution is whether rulemaking constitutes a "matter" within the meaning of DR 9-101 (B).[4]

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[1]The Committee normally tries to avoid responding to cases which involve pending or contemplated litigation at the time that an inquiry is made. *See* Legal Ethics Committee Rule C-4; Opinion No. 88. We do not know whether the situation which prompted the present inquiry involves litigation, but the hypothetical nature of the question presented makes it unlikely that our opinion will interfere with any on-going or contemplated proceedings that might exist.

[2]In construing 18 U.S.C. § 207, the inquirer has concluded that the criminal provisions contained in that statute do not directly prohibit the conduct at issue. Subsection (a) of that section permanently prohibits a former government employee from representing a private client with respect to a matter in which the former employee was personally and substantially involved while in government service. Subsection (b) imposes a two-year ban on the representation of private clients in connection with a matter for which a former government employee had official responsibility while in government service. Although both prohibitions might initially appear to apply to the present situation, the inquirer observes that the legislative history of § 207, as well as the 5 CFR Part 737 regulations promulgated to implement that provision, unambiguously exclude rulemaking from the scope of those prohibitions.

Subsection (c) of § 207 imposes a one-year ban on official contacts by former high-level government employees with their former agencies in connection with any matter, regardless of prior personal or official involvement. The purpose of this provision is to prevent favoritism that otherwise might occur as a result of relationships that could continue to exist between the former employee and present agency personnel. The inquirer points out that subsection (c) expressly includes rulemaking within its scope but notes that the prohibition is not likely to be violated in the circumstances raised by the inquiry. This is because a former employee challenging the validity of an agency rule, at least where the challenge is a judicial one, will generally communicate with the Department of Justice attorneys representing the agency, rather than with employees of the agency itself. This would not violate the provisions of subsection (c).

[3]Legal Ethics Committee Rule C-5 states that "[t]he Committee will not ordinarily give opinions on questions of law, other than those arising under the Code of Professional Responsibility."

[4]As we noted in Opinions No. 26 and 16, the presence or absence of "substantial responsibility"

The inquirer recognizes that the term "matter" has been construed by the American Bar Association to exclude rulemaking. *See* Formal Opinion No. 342, ABA Committee on Ethics and Professional Responsibility (Nov. 24, 1975). However, the inquirer has suggested that a proper interpretation of the term "matter" requires a distinction to be drawn between legal actions involving a particular interpretation of a rule for which a former employee had substantial responsibility and actions challenging the validity of the rule itself. The inquirer believes that disputes relating to the interpretation of a rule properly should be excluded from the scope of DR 9-101(B). However, where a former employee challenges the validity or legal sufficiency of a rule for which that very employee had substantial responsibility during the promulgation process the inquirer believes that the "matter" is the functional equivalent of the other types of proceedings that have been held to be within the scope of DR 9-101(B), and that the rulemaking exclusion should not apply. Accordingly, the precise question with which we are confronted is whether the term "matter" as used in DR 9-101(B) encomasses rulemaking where a former agency employee who had substantial responsibility for the promulgation of an agency rule represents a private party seeking to challenge the validity of that rule.

Discussion

As the inquirer points out, the hypothetical situation described in the inquiry is arguably governed most directly by DR 9-101(B). That Disciplinary Rule states:

> (B) A lawyer shall not accept private employment in a *matter* in which he had substantial responsibility while he was a public employee. [Emphasis added; footnote omitted.]

The term "matter" is not defined in the Code, but the meaning of that term has been addressed in the frequently quoted ABA Opinion No. 342, *supra:*

> Although a precise definition of "matter" as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. *By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws,* or in briefing abstract principles of law, *does not disqualify the lawyer under DR 9-101 (B) from subsequent private employment involving the same regulations,* procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties. [Emphasis added.]

The ABA interpretation, which has generally been adopted by this Committee, *see, e.g.*, Opinion No. 84, explicitly excludes rulemaking from the scope of "matters" encompassed by DR 9-101(B). *See also* Opinion No. 71. In this regard, DR 9-101(B) is similar to 18 U.S.C. § 207, which, as the inquirer points out, also excludes rulemaking from the scope of its criminal conflict of interest provisions.[5] Moreover, as is discussed more fully below, the District of Columbia Court of Appeals, in considering the proposed "revolving door" rules presently before the Court, has arguably declined to impose Canon 9 restrictions on former government employees resulting from their rulemaking activities. The pattern that emerges is unmistakable: the drafters of the various conflict-of-interest rules that presently exist perceived some need to immunize public employees engaged in rulemaking from the automatic restriction imposed upon public employees engaged in other types of activities while in government service.

We have been unable to find a precise articulation of the basis for excluding rulemaking from the scope of conflict-of-interest restrictions imposed upon former public employees. However, a review of the legislative history of 18 U.S.C. § 207, the regulations contained in 5 CFR Part 737, and ABA Opinion No. 342, *supra,* which construes DR 9-101(B), suggests that two concerns underlie the rulemaking exclusion. First, the general, prospective nature of rulemaking and the possible absence of specific parties involved in a rulemaking proceeding appear to be viewed as reducing the dangers posed by a conflict-of-interest situation. Second, because the exclusion of rulemaking reduces the severity of the restrictions placed upon post-government employment, more attorneys may be willing to accept government employment than would be willing to do so if rulemaking were not excluded. *See* ABA Opinion No. 342, *supra.* Those justifications neither require nor preclude acceptance of the inquirer's suggestion that challenges to the validity of a rule by the very former official who was responsible for promulgating the rule should be treated as a special "matter" within the scope of DR 9-101(B). However, in light of the consistent manner in which rulemaking has been excluded from conflict-of-interest restrictions relating to former government employees, we conclude that DR 9-101(B) does not itself prohibit private employment in the circumstances described in the inquiry.

The fact that DR 9-101(B) does not prohibit the conduct at issue, however, does not mean that other provisions of the Code are inapplicable or that the distinction suggested by the inquirer is not a useful one. Rather, it means that attorneys who were involved in rulemaking while employed by the government are not automatically precluded from accepting private employment in connection with such rulemaking. Nevertheless, those attorneys must still determine whether private employment undertaken in connection with their prior rulemaking activities would violate any other Disciplinary Rule.

Whenever an attorney represents interests adverse to those of a former client, including a governmental employer, two distinct dangers are presented. The prior representation may interfere with the independent exercise of the attorney's judgment while subsequently representing another client in connection with a related matter, thereby rendering the subsequent representation inconsistent with the provisions of Canon 5. In addition, such an attorney could be called upon to disclose or misuse confidences or secrets of the prior client in his or her subsequent representation of other clients in a way that would violate the provisions of Canon 4. In fact, the DR 9-101(B) restriction itself is based upon a desire to avoid these dangers. *See* ABA Opinion No. 342, *supra.*

Canon 5 directs a lawyer to exercise independent professional judgment on behalf of a client. DR 5-105(A) states:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C). [Footnotes omitted.]

DR 5-105(B) applies the same standard to continuation of employment after the possibility of impaired judgment is discovered. Opinion No. 94. Although DR 5-105 is addressed most directly to simultaneous representation of multiple interests, we have determined that the independent professional judgment of an attorney can also be impaired in violation of the Rule as a result of prior employment, especially where the prior employment involved a matter that is substantially related to the prospective employment. *See* Opinions No. 84, 78, 71 and 63. Where an attorney is asked to challenge the validity of a rule which he or she was substantially responsible for promulgating while employed by an agency, the danger of impaired judgment could be grave. Assuming that the attorney rendered conscientious legal service to the government agency, the attorney is likely to feel a sense of loyalty to the rule for which he or she is substantially responsible, and that sense of loyalty could

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will usually turn on the particular facts at issue. It is precisely because the present inquiry does not require us to determine whether the responsibility of the former employee was "substantial" that we believe that we are able to respond to the inquiry without access to additional facts. The interpretation of the term "matter" will also frequently turn on the facts of particular cases. *See* Opinion No. 84. Here, however, as noted below, our interpretation of the term "matter" is not particularly fact-dependent.

[5] *See* footnote 2, *supra.*

interfere with the attorney's ability effectively to challenge the validity of the rule.

Subsection (C) of DR 5-105 permits an attorney to represent a client notwithstanding the other provisions of the Rule only if two conditions are satisfied. Subsection (C) states:

> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Accordingly, an attorney may ethically represent a client despite a potential impairment of the attorney's independent professional judgment only if: (1) it is "obvious" that the attorney's representation will, nevertheless, be adequate; and (2) the client consents after full disclosure by the attorney of the nature and scope of any impairment of the attorney's judgment that might exist. *See* Opinions No. 94, 92, 54 and 49.

The Committee has considered the meaning of the "obvious" requirement on numerous occasions and has concluded that it requires the attorney to determine that the representation will be adequate to the purposes of the client after the attorney has ascertained the nature of the representation that the client desires. Opinion No. 49. *See also* Opinions No. 94, 92 and 54. The "consent" requirement is satisfied only if the client's consent is obtained after the attorney has made a full and detailed disclosure of the ways in which the attorney's judgment might be impaired in light of the particular circumstances at issue. *See* Opinions No. 94 and 68. Taken in combination, the two requirements demand that the attorney consider all pertinent factors, that they be disclosed to the client, that the client be satisfied with the quality of the representation that is likely to ensue, and that the attorney also be independently satisfied with the quality of that representation in light of the attorney's assessment of the objectives of the client.[6]

Because adequate consideration and full disclosure of the conscious and unconscious factors which could interfere with the independence of an attorney's judgment in the situation described in the inquiry would be difficult, the burden placed on such an attorney by DR 5-105 is a heavy one. If the circumstances surrounding the client's desire to retain the attorney were to suggest that the client hoped or expected to obtain any unfair advantage by virtue of the attorney's participation in the rulemaking proceeding, we believe that DR 9-101(C) would require the attorney to emphasize that his or her past agency employment would not enable the attorney to influence the agency improperly or upon irrelevant grounds. In addition, we believe that the restrictions imposed by Canon 4, which are discussed below, would also have to be disclosed to the prospective client.

Canon 4 requires a lawyer to preserve the confidences and secrets of a client. DR 4-101 states in pertinent part:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure. [Footnotes omitted.]
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> ***

In the course of a rulemaking, agency attorneys who are substantially involved in the promulgation process may well learn client "confidences" which cannot be disclosed without the consent of the agency. More importantly, such attorneys necessarily obtain knowledge of client "secrets"—information unavailable to the general public, the disclosure of which could embarrass or adversely affect the interests of the agency. For example, knowledge of certain arguable defects in a particular scientific study upon which a rule was based or of unrecorded White House contacts with agency officials concerning the rule would appear to constitute "secrets" within the meaning of DR 4-101(A). An attorney possessing such knowledge who was asked to challenge the validity of the rule to which it pertained would be on the horns of a serious dilemma. Zealous representation of the client challenging the validity of the rule would require the attorney to make use of that knowledge. *See* Canon 7. However, DR 4-101(B) expressly prohibits the attorney from making use of that knowledge, precisely because it would place the government at a disadvantage in defending the rule. Although the agency can consent to disclosure of confidences or secrets under DR 4-101 (C), the prohibition on use of client secrets in a way that would adversely affect the interests of a former client appears to be an absolute one which not even the agency would be authorized to waive.

It is apparent that potential ethical problems are posed whenever a former agency employee who was substantially involved in a rulemaking proceeding later represents a private party in connection with that rule.[7] Where the private party challenges the very validity of the rule, the potential problems can be particularly serious.[8] In fact, we view the problem as so severe that we have proposed an amendment to the District of Columbia Code of Professional Responsibility which would impose an automatic bar on subsequent representation of private clients in such circumstances. The proposed bar would have much the same effect as the interpretation of DR 9-101(B) suggested by the inquirer.

The Board of Governors of the District of Columbia Bar has agreed that a rulemaking bar is desirable and as part of its proposed new "revolving door" rule has petitioned the District of Columbia Court of Appeals to add a new provision to DR 9-101 which would impose an automatic five-year bar on private representation by former agency attorneys in connection with any rule for which the attorney had substantial responsibility during the promulgation process. The petition, which is reproduced on pages 47-63 of the April/May 1979 edition of the *District Lawyer*, vol. 3, no. 5, was transmitted to the Court on February 9, 1979. On April 17, 1980, the Court issued a proposed Order, that was to take effect on June 10, 1980, granting the petition in part. However, on June 10, 1980, the Court issued a Notice staying the effectiveness of its April 17, 1980 Order, presumably to enable it to reconsider various aspects of its proposed Order in light of the comments it received concerning that Order.

On July 28, 1981, the Court issued a second proposed Order and solicited additional comments from interested parties concerning the provisions of that Order.

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[6]The "obvious" and "consent" requirements apply only with respect to the prospective client, because former clients are no longer in a position to be harmed by any impairment of the attorney's judgment within the meaning of Canon 5. *See* Opinions No. 78 and 71. However, former clients do have continuing interests which, as is discussed below, are protected by Canon 4.

[7]In Opinions No. 78 and 71 we considered the effect of Canons 4 and 5 on a government attorney who wished to become involved in the enforcement and interpretation of an agency rule with respect to which the attorney had previously filed comments while in private practice. In those opinions we found to be controlling the very same considerations that have been discussed above. We concluded that the conduct there at issue was not unethical because the facts upon which those opinions were based did not present the high likelihood of improper conduct that surrounds the facts of the present inquiry, where the attorney whose conduct is at issue is coming out of, rather than going into, government service.

[8]Presumably, it is the seriousness of the problem posed when the validity of a rule is challenged that prompted the inquirer to suggest that such cases be treated as special ones falling within the scope of DR 9-101(B). Although we do not construe DR 9-101(B) to encompass the special situation described by the inquirer, we do agree with the inquirer that grave problems are posed whenever a former agency employee responsible for promulgating a rule switches sides and then challenges the validity of that rule.

Neither the April 17, 1980 nor the July 28, 1981 proposed Orders granted that portion of the petition relating to a new provision to govern rulemaking, and to date, the Court has taken no further action with respect to amending Canon 9. It appears unlikely that the Court will adopt a new rulemaking provision. However, because the proposed Canon 9 amendments are directed at the appearance-of-impropriety issues raised by the revolving-door problem, we do not attribute to the Court any intent to relieve attorneys in the situation presented by the present inquiry from the obligation of complying with the requirements of DR 5-105 and DR 4-101.

Conclusion

For the reasons stated, we believe that DR 9-101(B) does not automatically prohibit a former government attorney who had substantial responsibility for promulgating an agency rule from representing a private party in a challenge to the validity of that rule. However, an attorney undertaking such private employment would run a serious risk of violating DR 5-105, which requires the independent exercise of professional judgment on behalf of a client, and DR 4-101 which prohibits disclosure or misuse of client confidences or secrets.

Inquiry No. 81-2-4
September 22, 1981

Opinion No. 107

DR 2-110(A)(2); DR 5-103(A)(1); EC 2-23; EC 5-7; EC 9-1; EC 9-2—Propriety of Asserting Retaining Lien Applicable to Ultimate Client's Papers Where D.C. Attorney Retained as Co-counsel by Other Attorneys Previously Retained by the Client

Synopsis

The considerations previously described in our Opinions Nos. 59 and 100 regarding the propriety of asserting a retaining lien applicable to client's papers when the attorney asserting the lien was directly retained by the client also apply when the attorney is retained by the client's previously retained attorneys who were authorized by the client to retain co-counsel on its behalf. Consistent with those considerations, where (1) the failure to make payment to the attorney is attributable solely to disagreements between counsel in which the ultimate client played no part (and of which the client may be unaware), (2) the client has no notice that a lien against its property may be asserted and (3) the attorney contemplating assertion of the lien rendered the legal services in question aware that agreement as to his fee had not been reached, an attorney's obligations to take all reasonable steps not to prejudice his client and to promote public confidence in the legal profession preclude assertion of the lien.

Facts

Out-of-state counsel representing a number of taxpayers retained the inquiring Washington, D.C., attorney to participate as co-counsel in representation of the taxpayers in litigation of a tax controversy. A fee arrangement was agreed upon between out-of-state counsel and the inquiring attorney, the taxpayers were informed that the Washington, D.C., attorney had been retained on their behalf, and the inquiring attorney appeared as co-counsel for the taxpayers in the litigation in question. This activity continued for approximately one year, and the inquiring attorney received payment for services rendered during that period from out-of-state counsel pursuant to the fee arrangement originally agreed upon.

At the end of the year, out-of-state counsel notified the inquiring attorney that they wished to renegotiate their relationship, including the fee arrangement. The inquirer and out-of-state counsel negotiated intermittently over the next nine months in an attempt to reach agreement concerning their future relationship. Throughout this period the inquiring attorney continued to perform legal services for the taxpayers with the knowledge of and at the behest of out-of-state counsel. At the end of the nine-month interval, the negotiations between the attorneys broke down, and the inquiring attorney withdrew from the tax litigation and discontinued performing services on the taxpayers' behalf.[1]

The inquiring attorney has submitted several statements to out-of-state counsel seeking payment for services rendered and expenses incurred in representation of the taxpayers during the nine-month negotiation period. No payment has been received in satisfaction of the statements. The inquirer believes that the failure to make payment is the result of a disagreement among out-of-state counsel as to the responsibility among them for payment. The inquirer does not suggest that the ultimate clients, the taxpayers, are at fault in the dispute or even aware of it.

As a product of its representation, the inquiring attorney has a considerable volume of papers in its possession, at least some of which are the property of the taxpayers. These papers include tax returns, court pleadings, discovery requests and responses and correspondence with the taxpayers and their out-of-state attorneys. The inquiring attorney's files also contain numerous drafts, research memoranda and other work product related to the representation.

[1]Although the facts presented with the inquiry do not disclose what steps were taken, we assume for the purposes of this opinion that the notice and other requirements of DR 2-110(A)(2) were met at the time of withdrawal.

Question

In the circumstances described, may the inquiring attorney ethically assert a retaining lien against some or all of the clients' papers in his possession?

Discussion

In responding to this inquiry we do not address the property law questions as to which papers in the inquiring attorney's possession are the client's property and which are his own. We also do not address the contract law questions implicit in the fact situation described or the substantive law of liens. Our opinion is confined to the ethical issues raised.[2]

As discussed at length in our Opinions 59 and 100, a retaining lien is a remedy provided by law that an attorney may ethically assert in appropriate circumstances in order to secure payment of fees for legal services rendered. In our Opinion 59 we recognized that in order to be effective it is presupposed that assertion of a retaining lien will result in inconvenience to the client. Indeed, we concluded that in some circumstances a retaining lien may properly be asserted even when papers against which the lien are asserted are "necessary" to enable new counsel to act effectively on the client's behalf. A lawyer's obligation to avoid "foreseeable prejudice" to a client (DR 2-110(A)(2)) was said to absolutely preclude assertion of a retaining lien only in three situations: "(a) the client gives other security for payment of the fees; (b) the client is financially unable to pay the fees; or (c) the file is necessary to the defense of a serious criminal charge or to the protection of the client's personal liberty."

Neither Opinion 59 nor Opinion 100 addresses the question of whether the right to assert a retaining lien is affected if the attorney contemplating assertion of the lien was retained as co-counsel by the client's attorney as differentiated from the client itself. Assuming that the requirements of the law of agency necessary to establish the original attorneys as agents of the client authorized to retain co-counsel on its behalf have been met, we see no bar to assertion of the lien inherent in the fact that the inquiring attorney has been retained by an authorized agent rather than by the principals directly. Recognizing that Washington, D.C., attorneys are frequently retained for special purposes by regular counsel for out-

[2]In confining our discussion to ethical considerations we follow our own Rule C-5 and the practice of the ABA Committee on Ethics and Professional Responsibility. In its Formal Opinion 209 the ABA Committee also declined to address substantive legal questions arising from contemplated assertion of a retaining lien. For a discussion of the substantive law relating to retaining liens, *see, e.g.*, Attorney's Retaining Lien Over Former Client's Papers, 65 Colum. L. Rev. 296 (1965); Grabowsky, *Attorney's Liens*, 2 Dist. Law 6 (April 1978); and illustrative cases cited in this committee's Opinion No. 59.

of-state clients and that a retaining lien is intended to serve as a remedy of last resort for the unwarranted refusal to compensate counsel for legal services rendered, we believe that blanket refusal to permit assertion of such a lien simply because retention of a Washington lawyer was undertaken by an authorized agent rather than the principal would unjustifiably deprive attorneys of the protection provided by the lien in circumstances that may warrant its assertion. It is fundamental to the law of agency that the principal is responsible for its agent's authorized actions.

Although we find that the inquiring attorney's secondary role does not impose an absolute bar to assertion of a retaining lien, and the facts described do not appear to fall into any of three categories of circumstances described in Opinion 59, those conclusions alone are not sufficient to resolve the question at hand. As we stated in Opinion 59:

> "We believe the lawyer has the obligation to attempt to minimize the interference with his client's interests that may result from a change in counsel, even when a fee remains unpaid. It is the lawyer who must take the initiative in exploring whether circumstances may justify assertion of a retaining lien and whether there are alternatives that will reduce or eliminate the potential prejudice."

We described the following situations as illustrative of circumstances in which a lawyer would not be justified in asserting a lien, even though not falling within the three categories described in Opinion 59: (1) where agreement can be reached substituting some other form of security for possession of the client's papers and (2) where the adverse impact on the client's ability to assert or defend an important interest would be of greater magnitude than the financial interest of the lawyer at stake. It was concluded that where such or similar considerations exist "the lawyer should remove the lien."

In addition, Opinion 59 makes clear that Ethical Consideration 2-23 should act as a constraint on a lawyer's resort to the remedy. EC 2-23 specifically provides that "A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject." This consideration is consistent with and related to EC 9-1 which provides that "A lawyer should promote public confidence...in the legal profession" and the admonition of EC 9-2 that "Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of lawyers." Referring to EC 2-23, we stated in Opinion 59 that "for purposes of considering the propriety of the actual assertion of a retaining lien, we must assume that he fee in question is reasonable, that it relates to professional services actually rendered, *and that the client's refusal to pay is reasonably regarded as improper.*" (Emphasis added.)

The particular facts of this case appear to us to preclude imposition of a retaining lien against the clients' papers by the inquiring attorney at this time. On the facts presented to us it is apparently not any act or position taken by the ultimate clients that has given rise to the failure of the inquiring lawyer to receive payment. Instead, the controversy seems to be entirely among lawyers, and there is no indication that the ultimate clients are in any sense at fault or even aware of the controversy. Indeed, it is possible that the inquiring lawyer may bear some responsibility for the existence of the controversy; he apparently undertook to provide the services in question after receiving notice that the preexisting arrangements for his retention were no longer considered satisfactory by the clients' primary attorneys and with knowledge that the controversy was unresolved. In any event, since it is the ultimate clients' papers that are to be withheld and their interests that will be prejudiced by the retention, they must be put on notice and given the opportunity to resolve the matter beforehand.

There is also no indication in the facts presented to us as to the magnitude of the fees in question as compared to the prejudice likely to befall the ultimate clients if their tax returns and other related papers are not returned. There seems to be a risk presented that the prejudice to the ultimate clients will outweigh the security required to achieve protection of the inquiring attorney's stake in the fees in controversy. If documents vital to the clients are not required to secure the fee, such documents should be returned and only those documents reasonably necessary to provide adequate security retained. The ultimate clients must also be given the opportunity to provide reasonably adequate substitute security for the papers now in their attorney's possession and to thereby obtain their return.

Finally, we are not presented with a description of the steps taken by the inquiring attorney to attempt to achieve a negotiated compromise of the matter at issue. Especially if services were provided with knowledge that the attorney's billing rates were considered unsatisfactory, the inquiring attorney does not satisfy his obligation to attempt to achieve a negotiated settlement of the controversy by simply submitting a bill at the original rate. As expressed in EC 2-23, an attorney should "be zealous in his efforts to avoid controversies over fees with clients," and such efforts presuppose a willingness to compromise his original demands.

These considerations have particular force when a step as drastic as retaining the client's tax returns and papers relating to an ongoing tax controversy is concerned. We can think of few actions more likely to bring the legal profession into disrepute than a lawyer's seizure of clients' tax returns and other related papers, undertaken without notice to the clients, because of a fee dispute among the clients' lawyers.

Inquiry No. 81-7-22
October 27, 1981

Opinion No. 108

DR 2-110(A)(2) and (C)(1)(d); DR 6-101(A)(3); DR 7-101(A); DR 7-102(A)(5)—Attorney's Responsibilities to Client Who Has Disappeared

The inquiring attorney was retained by the client to represent her in connection with a potential personal injury claim against a department store and its insurer. During the course of a brief first interview, the client informed the attorney, in essence, that she had been injured while working as an employee in the kitchen of the department store. During the first conference the attorney and the client also executed a retainer agreement which provided, *inter alia,* for a contingent fee equal to 30 percent of the amount recovered from the store or its insurer. The client has not advanced any funds.

Following the initial conference with his client, the lawyer contacted the store and its insurer with regard to his client's claim. Preliminary discussions included the question of whether the client had filed for workmen's compensation and whether the client had otherwise contacted the store or the insurer with respect to her claims. The store and the insurer answered both of these questions in the negative.

The lawyer then attempted to discuss the matter again with his client. He also wished to obtain from her any medical or other records supporting her claim. However, his efforts to contact her at that time and subsequently have been unsuccessful. These efforts have included numerous letters and telephone calls. The client's telephone has been disconnected and there is not a new listing for her in the metropolitan area. The attorney's letters have been returned with a notation by the postal service that it does not have on file a forwarding address for the client. Another attorney in the inquiring attorney's office who had been a neighbor of the client notified the inquiring attorney that the client had moved. The associate attorney also reported to the inquiring attorney that neighbors of the client indicated that they did not have another forwarding address for the client and believed that she had moved to some state in the South.

The inquiring attorney reports finally that the period of limitations for the filing of an action with respect to the client's potential claims is about to expire.

The inquiring attorney asks whether under these circumstances he is required to file a civil action on behalf of the client or to reactivate settlement discussions with the store's insurer. The attorney is obviously concerned with the requirements of DR 6-101(A)(3) that "a lawyer shall not neglect a legal matter entrusted to him" and the re-

quirement of DR 7-101(A) that:

A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law or the disciplinary rules....

(2) Fail to carry out a contract of employment entered into with a client for professional services....

(3) Prejudice or damage his client during the course of the professional relationship....

In addressing this issue the Committee finds significant guidance in its Opinion No. 85, in which the different but related issue of withdrawal from representation of an uncooperative client was reviewed.[1] In that situation the attorney represented the client in an automobile accident matter and had been authorized by the client to negotiate a settlement without trial if possible. The attorney subsequently informed the client of a settlement offer from the insurer. The client orally authorized the lawyer to accept this offer and the lawyer conveyed his client's acceptance to the insurer. Some months after receipt and disbursement of the settlement payment, the client informed the lawyer that she wished to rescind the settlement agreement. The lawyer prepared the documents necessary to pursue this decision and mailed them to the client for her signature. She telephoned the attorney that she had received the documents and would sign and return them to his office. She failed to do so on that or subsequent occasions despite repeated assurances to the attorney that she would. The Committee concluded under those circumstances that the attorney could ethically withdraw from his representation of the client because the client, in the terms of DR 2-110(C)(1)(d), had "[b]y other conduct render[ed] it unreasonably difficult for the lawyer to carry out his employment effectively." The Committee cautioned the attorney, however, that even under these circumstances he should be mindful of the requirement in DR 2-110(A)(2) that:

> ...[A] lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with the applicable laws and rules.

This reminder has consistent with the Committee's observation in Opinion No. 48 that "...whenever an attorney withdraws, great care must be taken to avoid disruption and prejudice to the rights of the client."

In light of the attorney's apparent diligence in this case and the apparent absence of any cooperation by or even communication from the client, it is clear from the provisions of DR 2-110(A)(2), DR 2-110(C)(1)(d), and Opinion No. 85 that the attorney would be entitled to seek leave to withdraw from the case if it were pending in court or otherwise to withdraw from the employment upon giving notice to his client and taking any other steps necessary to protect the client's interests. A different result should not ensue and greater obligations should not pertain solely because the client has disappeared and has, by any reasonable judgment, abandoned her possible claim. For as reported to us, the attorney has "taken reasonable steps to avoid foreseeable prejudice to the rights of his client." The problem is compounded, of course, as is the attorney's concern, by the impending expiration of the period of limitations. This situation, however, is not of the attorney's making, but of the client's. Indeed, it appears that the attorney has been commendably diligent and conscientious in attempting to locate the client so that he can continue to "seek the lawful objectives of his client" as required by DR 7-101(A)(1). The client appears solely responsible for making it "unreasonably difficult for the attorney to carry out his employment effectively." Under these circumstances, we know of no consideration suggesting that the attorney is obligated to take further action.[2]

Inquiry No. 81-7-23
October 24, 1981

[1] It has recently been observed that "[t]he [American Bar Association's] Committee [on Ethics and Professional Responsibility] has not issued any opinions that construe [DR 2-110(B) and (C), the provisions regarding withdrawal]; and there is almost an equal dearth of judicial decisions." American Bar Foundation, *Annotated Code of Professional Responsibility* 127 (1979).

[2] A similar conclusion was reached by the Los Angeles County Bar Association in its Informal Opinion No. 1958-1. In that matter, the attorney had undertaken the defense of the client in both a divorce proceeding and a rent collection action. The client failed to appear for trial in the latter case and the attorney subsequently was allowed by the court to withdraw from that case. The client was not seen or heard from thereafter. Four years later, the divorce matter was scheduled for a pre-trial hearing. The attorney inquired as to his obligations at this point, and the Committee concluded that the client "...elected to abandon the litigation entirely.... Under such circumstances an attorney should not be required to carry on on behalf of his client...." *See also, Ambrose* v. *Detroit Edison Co.*, 65 Mich. App. 484, 237 N.W.2d 520, 523 (1976) ("...[A] client's total failure to cooperate is sufficient 'good cause' to allow an attorney to discontinue representing his client...."); *Borup* v. *National Airlines*, 159 F. Supp. 808, 810 (S.D.N.Y. 1958) ("While an attorney has an obligation to use diligence in the prosecution of an action, a client equally has an obligation not to so conduct the action as to make the duties of the attorney unreasonably onerous, to delay the trial and possibly to impair the possibility of a good recovery." *Cf. Murphy* v. *Solomon*, 196 N.Y.S.2d 359, 22 Misc.2d 857 (Supp. Ct., King's County, Part I, 1959); *Schmittinger* v. *Grogan* (*Appeal of Cohen*), 182 Pa. Super. 399, 128 A.2d 114, 116 (1956) ("It does not follow that an attorney must continue to serve a client indefinitely when he is unsuccessful in locating him after reasonable effort to do so.")

Opinion No. 109

DR 2-102(A), DR 2-102(B), DR 2-103(B), DR 2-103(C), DR 2-107(A), DR Definition (8)—Referral from Non-prepaid Group Legal Services Plan; Referral to Partnership Without Disclosure that Referrer has a Financial Stake in the Partnership; Division of Fees with Attorney who Purports to be a Partner

Synopsis

A lawyer may accept referrals from a group legal services plan serving members of federal credit unions, if the plan is designed to help members obtain quality legal services rather than to procure financial benefit or legal work for the lawyer. If the members of the plan are told to call lawyer A in order to be referred to appropriate counsel, failure to disclose the business relationship between lawyer A and lawyer B, to whom he or she refers the matter, would violate DR 2-102(A) and (B) and DR 2-103(B)(1). DR 2-107(A) exempts only partners in a bona fide law partnership from the rules regarding division of fees among themselves. The partnership arrangement between lawyers A and B here would lack the normal attributes of a law firm and would appear to have the purpose of circumventing DR 2-107(A). Because it would not be a bona fide law partnership, lawyer B's payment of a flat 20 percent referral to lawyer A would violate DR 2-107(A).

Facts

An attorney inquires about the propriety of accepting referrals in the following situation. An out-of-town attorney and/or incorporated law firm (hereafter referred to as organizing attorney) has organized a non-prepaid group legal services plan serving members of several area federal credit unions. The organizing attorney would enter into a partnership agreement with an attorney in Washington (hereafter referred to as local counsel). The legal services organization would refer to the partnership clients responding to group legal service plan literature. The partnership name would appear on local counsel's office or firm door. The organizing attorney would install a set of phones in his name in local counsel's office, to be used solely for the business of the group legal services plan. Local counsel would have sole responsibility, after the referral, for deciding whether to accept an individual's case; in setting fees to be charged; and in prosecuting or handling the referral client's case thereafter. The initial client consultation would be free. The organizing attorney would be entitled to receive a 20 percent "partnership draw," calculated on the basis of the fees charged each referral client. Should local counsel be deemed not to be advancing the interests of the referral clients, or if otherwise doing a poor or inadequate job, the organizing attorney would have the right to terminate the partnership relationship. The organizing attorney has partnership offices throughout one

state and associates in major U.S. cities.

The inquiry does not include further information regarding the content of the group legal services plan literature, the mechanisms for referral, or the relationship between the organizing attorney and the group legal services plan.

Analysis

DR 2-103(B) and (C) of the District of Columbia Code of Professional Responsibility[1] allow an attorney to accept referrals from a group legal service plan. Those provisions bar attorneys from accepting referrals from organizations which engage in certain promotional activities, such as fraud or coercion and also bar attorneys from compensating organizations for such referrals. However, the D.C. Code was amended on July 12, 1978 to delete provisions of the ABA Code of Professional Responsibility which define in detail circumstances where attorneys may accept referrals from such organizations (ABA DR 2-103(C) and (D)). The simultaneous deletion of these detailed requirements and adoption of the explicit ban on certain referral practices reflect an intention to allow other referral practices. Thus the Code of Professional Responsibility allows the acceptance of referrals from a group legal services plan.

Although the local attorney may therefore accept referrals, the facts described in this inquiry raise substantial ethical questions.

1. *Purpose of the referral system*

The same order of the District of Columbia Court of Appeals which amended the Ethical Considerations and Disciplinary Rules under Canon 2 also added a new definition:

> "Qualified legal assistance organization" means a legal aid, public defender, or military assistance office; a lawyer referral service; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service or organization receives no profit from the rendition of legal services; is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, and is not in violation of any applicable law.[2]

While the term "qualified legal assistance organization" is not used elsewhere in the Disciplinary Rules, it does appear in EC 2-33.[3] Reading the definition—which is part of the Disciplinary Rules—in conjunction with EC 2-33[4]—which is aspirational rather than mandatory in nature—we conclude that an attorney may enter into a referral arrangement with a qualified legal assistance organization, but not with a legal assistance organization which is "designed to procure financial benefit or legal work for a lawyer as a private practitioner." The rationale for this distinction is clear: the legal assistance organization holds itself out as existing to benefit its members. If it is actually only a device for promoting a lawyer, the referrals are obtained by misleading members of the organization.

The group legal service plan involved in our inquiry receives no profit from the rendition of legal services, and there is no suggestion that it is in violation of any applicable law. Therefore, if the plan is designed to provide members of the credit unions high quality legal services rather than to procure financial benefit or legal work to the newly formed partnership, a referral arrangement with the organization would be ethical. The fact that the organizing attorney stands to profit from the referrals is susceptible to an inference that the plan is designed to procure him or her financial benefit by directing legal work to the newly formed partnership. However, the possible benefits to members of the federal credit unions would support an inference that the plan is primarily designed to provide needed legal services. The inquiry does not include sufficient information to determine which inference should prevail here.

2. *Referral to the partnership by organizing attorney.*

The role of the organizing attorney raises other ethical concerns. While we lack details, the system of placing phones in the name of the organizing attorney may lend itself to operation in a manner which is misleading or deceptive, in violation of DR 2-102(A) and (B) and DR 2-103(B)(1).[5] If members of the federal credit unions are told to call the organizing attorney's number in order to be referred to appropriate counsel, they would reasonably expect individualized referrals, tailored to the nature of the claim and uninfluenced by a financial arrangement between the referring entity and the attorney to whom they are referred. The caller would not expect that the organizing attorney is located in the offices of the local

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[1]Those provisions state:

(B) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of his or her services or those of his or her partner, or associate, or any other lawyer affiliated with him or her or his or her firm, as a private practitioner, if:

(1) The promotional activity involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-01(C); or

(2) The promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over persuasion, overreaching, or vexatious or harassing conduct.

(C) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his or her employment by a client, or as a reward for having made a recommendation resulting in his or her employment by a client except that he or she may pay for public communications permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service.

[2]This definition is drawn from ABA DR 2-103 (D)(4)(a), (b), (c), and (f).

[3]EC 2-33 provides: "As a part of the legal profession's commitment to the principle that high quality legal services should be available to all, attorneys are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interest of individual clients. An attorney so participating should make certain that his relationship with a qualified legal assistance organization in no way interferes with his independent, professional representation of the interest of the individual client. An attorney should avoid situations in which officials of the organization who are not lawyers attempt to direct attorneys concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the attorneys employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standard of effort and competence."

[4]We do not read the reference in EC 2-33 to "prepaid legal services" as excluding other qualified legal assistance organizations from the suggestion that attorneys should cooperate with such organizations. The rationale for encouraging cooperation with prepaid legal services programs is "the principle that high quality legal services should be available to all." EC 2-33. This rationale applies equally to all qualified legal assistance organizations. The definition of qualified legal assistance organization includes non-prepaid group legal services plans.

[5]Those provisions state in pertinent part:

DR 2-102(A) A lawyer or law firm shall not use or participate in the use of a professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing, or a similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B)....

DR 2-102(B) A lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, or deceptive within the meaning of DR 2-103(B), or is contrary to law....

DR 2-103(B) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of his or her services or those of his or her partner, or associate, or any other lawyer affiliated with him or her or his or her firm, as a private practitioner, if:

(1) The promotional activity involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B)....

attorney, has entered partnership agreement with the local attorney, and will receive 20 percent of the local attorney's fees. Nor is there any indication that the caller will be so informed. If the referral system operates in this manner, it would violate DR 2-102(A) and (B) and DR 2-103(B)(1), which forbid telephone listings, names, and promotional activities which are misleading within the meaning of DR 2-101(B).[6]

3. *Division of fees.*

Related to the above concern is the provision for division of fees. Since the organizing attorney is not merely being compensated for public communications (DR 2-103 (C)) or receiving the usual and reasonable fees or dues on behalf of the referral service (*ibid.*), the question is whether DR 2-107(A) permits the local attorney to pay him 20 percent of the legal fees generated by the referrals.[7] There is no indication in the inquiry that the client will receive full disclosure of the division of fees. Moreover, it is clear that payments of a flat 20 percent of every fee would not be in proportion to the services performed and responsibility assumed by each lawyer. See our Opinion 65. It would follow that the total fee charged by local counsel may be inflated in order to pay the 20 percent to organizing counsel. *Id.* The question, then, is whether the partnership between organizing counsel and local counsel renders DR 2-107(A) inapplicable. The inquiry provides certain information regarding the partnership. It appears that the local attorney would perform all the legal work referred by the group legal service plan; that the organizing attorney would share in the partnership draw only in proportion to the fees generated by his referrals and would not receive any share of other fees received by local counsel; that the organizing attorney would not perform fee-earning work for the partnership and has apparently not contributed to the capital of the partnership; that the organizing attorney has entered numerous other partnerships; that local counsel has sole responsibility—without the participation of the organizing attorney—for deciding whether to accept a referred case, in setting fees, and in handling the case; and that if the organizing attorney is dissatisfied with local counsel he or she may terminate the partnership agreement.

In our view the above arrangement is not a bona fide law partnership within the meaning of DR 2-107(A). While the partnership agreement may be adequate to create a partnership under the law of the District of Columbia, a partnership under the disciplinary rules is more than an ordinary business arrangement. DR 2-107(A) refers to a law partnership, composed of lawyers who pool their resources and skills into a joint law practice, and the fact that an arrangement follows D.C. law does not dispose of the issue under the disciplinary rule. The only function apparently served by the partnership in this instance would be to circumvent DR 2-107(A). Such a purpose is inadequate to render the arrangement a bona fide law partnership.

Inquiry No. 81-7-21
November 24, 1981

Opinion No. 110

DR 2-101(B)(6); (C)(3)—Propriety of Advertisement Describing Law Firm as "The Immigration Lawyers" with "Services to Aliens Around the World"

Summary of Opinion

A law firm's advertisement which includes the descriptive term "The Immigration Lawyers" does not violate the disciplinary rules against misleading advertising. The advertisement appeared in the District of Columbia Bell System Yellow Pages, and contains statements in other languages giving approximately the same descriptive terms. (See District of Columbia Bell System Yellow Pages, May, 1981, p. 958.

Applicable Provisions of the Code of Professional Responsibility

DR 2-101 Publicity and Advertising

(B) Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:

(6) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

(C) A lawyer shall not, on his or her own behalf, or on behalf of a partner or associate, or any other lawyer affiliated with the firm, use or participate in the use of any form of public communication which:

(3) Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public.

Discussion

"The Immigration Lawyers" is set forth in several languages along with a listing of the name of the law firm's principal attorney. The legend "Services to Aliens Around the World" appears above a listing of the types of immigration services provided. A concluding line invites, "Call for Information Brochure and Application."

The primary obligation of an attorney placing an advertisement is that it is not misleading. DR 2-101(B). There is nothing obviously misleading in the representations made in the advertisement of these attorneys. The advertisement describes the types of work immigration lawyers normally do.

The term "The Immigration Lawyers" could be regarded as misleading only if it is assumed that a potential client would believe that these attorneys are the one and only lawyers so qualified. A statement is deceptive if it includes a statement which "[c]ontains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive." We conclude that use of a definitive article "the" will not result in misleading the ordinary prudent person. Immigrants range across a broad spectrum of education and sophistication. Any person seeking an attorney for an important matter through the Yellow Pages

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[6]DR 2-101(B) provides:

Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:

(1) Contains a material misrepresentation of fact;

(2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;

(3) Is intended or is likely to create an unjustified expectation;

(4) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;

(5) Relates to legal fees other than:

(a) A statement of the fee for an initial consultation;

(b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(c) A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter;

(e) The availability of credit arrangements; and

(f) A statement of the fees charged by a qualified legal assistance organization in which he or she participates for specific legal services the description of which would not be misunderstood or be deceptive; or

(6) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

[7]DR 2-107(A) provides:

A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

will necessarily have at least a slight degree of facility in the English language, and is likely to see not only this advertisement, but also numerous other law firms which list immigration as an area of practice, (at pages 955, 961, 962, 966, 969, 981, 987). The Yellow Pages' Lawyer Guide, at p. 975, lists approximately forty law firms as practicing immigration law. The suggestion that this is "the" one and only law firm in immigration work will be discounted.

Approval of the descriptive heading "The Immigration Lawyers" poses even less of an issue than our approval of a private law firm's use in its name of the term "The Legal Clinics...." We concluded that a private law firm may use the term "but with caution," because the term "Legal Clinics" suggests that a firm offers "standardized and multiple services" "at lower than average prices." Opinion 87. The use of "The Immigration Lawyers" suggests nothing more than the firm's attempt to attract clientele with particular types of legal problems. Opinion 95 (approval of advertisement seeking persons injured by accident by a group denominated "Accident Legal Assistance Center").

The legend "Services to Aliens Around the World," while expansive, is also not deceptive or misleading.[1] The legend merely states that an alien, regardless of location or place of origin, can receive service from this firm on immigration matters. This legend is not a "representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public." DR 2-101(C)(3).

The concluding invitation of the advertisement to get more information by "information brochure and application" is ethically neutral. We do not know the contents of the referred material and are not rendering an opinion on their contents.

Inquiry No. 78-9-16
May 18, 1982

Opinion No. 111

DR 9-101(B)—Propriety of Former Government Attorney Representing a Party in Litigation Against the Government When the Attorney Had Been Nominally Involved in the Same Litigation While in Government Service

Synopsis

DR 9-101(B) precludes a former public employee from representing a private client in a matter in which he had "substantial" responsibility while he was a public employee. The mere maintenance of a file of public pleadings with respect to litigation, absent any further participation in or responsibility for the matter, does not constitute "substantial" responsibility within the meaning of the rule.

Facts

The inquiring attorney was previously employed as an Assistant United States Attorney and is now in private practice. While employed in the U.S. Attorney's Office, the inquirer was assigned responsibility within that office for the first of what later became a series of cases relating to the same subject matter. On the day of the initial assignment the Department of Justice indicated that it would take responsibility for all such cases and that the Office of the U.S. Attorney would not participate in the litigation. Other than reading the first complaint, the inquirer did not render any advice, take any action nor was he consulted by the Department of Justice or anyone else with respect to the litigation, and at no time did he enter an appearance or appear on any service list in any of the cases.

The only subsequent action taken by the inquirer with respect to the cases was to maintain a file in the U.S. Attorney's Office of public pleadings relating to the litigation. The inquirer was not privy to any documents relating to the litigation. The inquirer was not privy to any documents relating to the litigation other than those public documents received by him when service copies were forwarded to the Office of the U.S. Attorney. He had no occasion to be consulted about any documents, participated in no discussions about any aspect of the cases and did not render advice or counsel to the government with respect to the handling of the litigation.

Subsequent to leaving government employment the inquirer has become associated with a private law firm that represents private parties involved in the same litigation. The positions of the private parties in the litigation are adverse to that of the United States. The inquirer has been asked by his firm to participate in the cases on behalf of the private parties.

Question

Is a former government employee forbidden by DR 9-101(B) to represent a private client against the United States in the same litigation in which formerly, as a government lawyer, he was involved to the extent described?

Discussion

Disciplinary Rule 9-101(B) states that "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The rule enforces Canon 9, which provides that "A lawyer should avoid even the appearance of professional impropriety." The disciplinary rule is specifically related to Ethical Consideration 9-3:

> "After a lawyer leaves...public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

The American Bar Association Committee on Ethics and Professional Responsibility discussed the purposes and application of DR 9-101(B) at length in its Opinion 342. As stated in that Opinion:

> "The policy considerations underlying DR 9-101(B) have been thought to be the following: the treachery of switching sides; the safeguarding of confidential governmental information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil."

In our own Opinion 16, this committee described two primary purposes of the Rule:

> "One is to prevent the appearance that a lawyer in public employment may be influenced in his actions as a lawyer by the hope of later personal gain in private employment rather than by the best interests of his public client.... The second purpose is to prevent the appearance that a lawyer may be utilizing for the benefit of a private client confidential information obtained in a prior attorney-client relationship with a public agency having interests in conflict with those of his private client."

This committee and the ABA committee have also described and given weight to important consideration limiting the prohibitory scope of the Rule. As stated by the ABA Committee in Opinion 342:

> "There are...weighty policy considerations in support of the view that the disciplinary rule...should not broadly limit the lawyer's employment after he leaves government service. Some of [these] underlying considerations...are the following: the ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service...; and the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their choosing, particularly in specialized areas requiring special, technical training and expertise."

Recognizing these countervailing considerations, the ABA Committee offered the following guidance in the application of the Rule to particular circumstances:

> "The issue of fact to be determined...is whether the lawyer has accepted 'private employment' in a 'matter' in which he had 'substantial responsibility' while he was a 'public employee.' Interpretation...is needed in regard to each of the quoted words or phrases, and each should be interpreted so as to be con-

[1] The accuracy of the legend, in the view of some committee members, might rest on whether this firm has offices around the world and/or is able to assist aliens moving among countries other than the United States. See DR 2-101(B)(2), (3), (6). Our decision is made on the text of the advertisement, not on a factual investigation of actual practice.

sistent, insofar as possible, with the underlying policy considerations discussed above."

The present inquiry calls for interpretation of the phrase "substantial responsibility" as used in the Rule in light of the considerations described. As presented to us, it is apparent that the "matter" in which the inquirer has been asked to participate on behalf of a private litigant is the same as that in which he formerly had some responsibility as a government attorney. The question is whether that former responsibility was "substantial."

In construing the term "substantial" it should be recognized at the outset that the responsibility in question is personal to the individual attorney. The Rule speaks of the responsibility which "he," the individual lawyer, had while in public service. As we made clear in our Opinions 16 and 26, it is not dispositive that the department or office in which the lawyer was employed had some or even total responsibility for the matter. *Accord,* ABA Opinion 342, *supra.*[1] It is with respect to the personal participation of the inquiring attorney himself that the issue of "substantiality" of responsibility must be addressed.

In Opinion 342 the ABA Committee construed the phrase "substantial responsibility" as follows:

> "As used in DR 9-101(B), 'substantial responsibility'...contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigation or deliberative processes regarding the transactions or facts in question."

In our Opinion 84 we concluded that a government employee's responsibility for a matter was substantial when his role was that of a professional staff member "actively involved in the teams that investigated and litigated [the] proceedings. While he may have had little authority to make major decisions about those proceedings, his involvement was direct, extensive and substantive, not *peripheral, clerical, or formal*" (emphasis added).

On the facts presented, the words "peripheral, clerical and formal" almost perfectly describe the role the inquiring attorney played in the matter in question while in government service. Indeed, he did not even enter a "formal" appearance in the matter. More significantly, his participation in the same matter on behalf of private clients after leaving government service impinges on none of the policies underlying the rule. The inquirer has been privy to no government confidences relating to the matter, there is no suggestion that the degree of his involvement in the matter while in government service could reasonably be expected to or did encourage his subsequent private employment or the prospective assignment in private practice to the same litigation, and public appearances should not be offended because as a government attorney he did not participate in the matter in a public way. On the other hand, to construe the phrase "substantial responsibility" to apply to these facts would strain the ordinary meaning of the words, and would impose an undue sacrifice on attorneys willing to devote some part of their careers to government service. For these reasons, we conclude that the inquiring attorney did not have "substantial" responsibility for the matter while a public employee and that he will not violate DR 9-101(B) by participating in the same matter as a private attorney after having left government service.

Inquiry No. 81-9-25
March 9, 1982

[1]A revision of DR 9-101(B) now pending approval by the District of Columbia Court of Appeals would codify this interpretation by providing: "A lawyer shall not at any time accept private employment in connection with any matter in which he or she participated *personally* and substantially as a public officer or employee...." Emphasis added. Since the revision has yet to be approved, this opinion is based on the existing rule.

[1]See Committee Rules C1-5.

Opinion No. 112

DR 5-101(A)—Attorneys as Members of a Labor Union Which Is The Principal Adversary of the Agency Employing the Attorneys; Conflict of Interest

Synopsis

The Committee has been asked by the Office of the General Counsel of the Office of Personnel Management ("OPM") whether attorneys in that office may ethically join a union ("the union") which, the inquirer indicates, is "consistently in an adversarial relationship" with the agency before courts and agencies and in negotiations. The Committee believes that it could violate Canon 5 and, specifically, DR 5-101(A) for such attorneys to represent OPM if they are members of the union.

Facts

The union represents federal employees. It considers the agency's attorneys to be within its bargaining unit. The agency unsuccessfully disputed this assertion before the Federal Labor Relations Authority (FLRA). In its inquiry, the OPM asserts—and we must assume[1]—that attorneys in the Office of the General Counsel serve as advocates for management, as opposed to neutral advisors, throughout the executive branch; that they appear before judicial and administrative tribunals and other third parties to represent management's position; that they are "consistently" in an adversarial relationship with the union; that the work of OPM attorneys, government-wide, affects to some degree all bargaining unit members including those at OPM; and that OPM attorneys have some personal interest in the outcome of conflicts between the federal employee unions and agency management.

In permitting attorneys to join the bargaining unit, the FLRA held, *inter alia,* that they "do not do personnel work which has direct impact on the employees of their own agency;" thus, they were not excluded from union membership by 5 U.S.C. § 7111(B)(2). The FLRA based its decision, in part, on the statutory status of professional employees in OPM's predecessor agency, the Civil Service Commission, and, in part, on the fact that the professionals in question act merely in an "informational" or "advisory capacity," and do not make "final determinations" or have "policy-making authority."

This Committee cannot adjudicate OPM's assertion that the attorneys' professional actions affect their interests as employees[2] but neither can the Committee defer to the FLRA's resolution of the issue, because the question before that agency was essentially whether OPM professional employees had ultimate authority for policy determinations that would have a direct impact on them as employees. Obviously, the Code of Professional Responsibility imposes obligations on attorneys whether they wield ultimate authority or act in an advisory capacity and whether their professional activities have a direct or indirect effect on their personal interests.

Analysis

Canon 5 provides that "[a] lawyer should exercise independent professional judgment on behalf of a client." Disciplinary Rule 5-101(A) prohibits a lawyer from accepting employment

> if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests.

Thus, Ethical Consideration 5-1 explains:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

The principal question presented by this inquiry is, then, whether union membership, in these circumstances, creates a financial or personal interest which will or may affect the attorneys' professional judgment. If so, these attorneys may not work for OPM if they are members of the union.

The Committee believes that membership in the union can constitute both an actual and an apparent dilution of the attorneys' loyalty toward their client. Here, the issue is

[2]See Committee Rules C1-5.

not whether union membership is proper, nor whether a lawyer may join a union. The inquirer has asked whether attorneys can simultaneously represent a client and belong to an organization which is assertedly the "principal adversary" of their client, where the success of the organization can affect their own financial and other employment interests. In Informal Opinion 1325 (1975), the American Bar Association Ethics Committee approved union membership for lawyers, but explicitly noted that membership in a union might put pressures on an attorney which conflict with the attorney's responsibility to his client. The Committee held, reiterating the language of Ethical Consideration 5-13, that attorneys who are union members should not

> permit the organization to prescribe, direct or suggest how to fulfill one's professional obligations, but should be vigilant at all times to safeguard one's fidelity to employer free from outside influence.

Where, as here, the union is one which the lawyer opposes on a daily basis, vigilance may not be able to prevent some influence, whether conscious or unconscious, on a lawyer's loyalty to and judgment on behalf of his client. *See also* ABA Informal Opinion 986 (1967) (recognizes potential conflict arising out of attorney membership in a union with non-attorneys). For this reason, if the attorneys wish to join the union, they must examine (1) their own professional duties and (2) the possible effects on their interests as employees of OPM's dealings with the union. If their interests as members of the union may affect their judgment as attorneys for OPM, they may not continue in both capacities, consistent with DR 5-101 (A)

Canon 7 may also be implicated by this inquiry, although we do not rely upon it. Union membership and the payment of dues to the union by the agency's attorneys is a contribution to their client's principal adversary. This Committee has recognized the right of attorneys to participate in community affairs and to affiliate with others for social, political and other purposes. *See* EC 7-17 ("The obligation of loyalty...implies no obligation to adopt a personal viewpoint favorable to the interest or desires of his client.") In Opinion No. 57, we held that a law firm's general contribution to a public interest law firm may be acceptable even where the latter might oppose the interests of the contributing firm's clients. Government attorneys may, similarly, contribute to organizations which oppose the government on various issues.

We noted, however, that the propriety of such contributions

> would depend on the extent to which the contributions were made for the purpose, or with the expected effect, of supporting the other side of a case in which the contributing lawyer or firm was actively representing an adverse party.

Because of the conclusions set forth above with respect to the applicability of DR 5-101 (A), the Committee has not addressed any issues arising under the Disciplinary Rules under Canon 7 in reaching its conclusions with respect to the conduct described in this inquiry.

Opinion 113

DR 2-106; DR 2-107; DR 3-102; DR 9-103[1]— "Fee Advances by Clients"

Several inquiries raise the issue of whether ethical restrictions exist regarding a law firm's use of fee advances. The fee advance is a payment made by a client to an attorney or law firm prior to the performance of any services. Typically, counsel will receive a sum, e.g. $1,000, and agree to charge against the fee advance for time expended at a predetermined rate and for costs incurred.

The fee advance is consumed as the attorney expends time and incurs expenses in dealing with the client's matter. If the case is completed or cancelled before the fee advance is consumed then the attorney is obliged to return the balance to the client. We conclude that no ethical obligation requires placement of the fee advance in a separate escrow account. The firm may commingle and use the fee advance with its other monies and use any interest earned.

We do not deal with ethical condsiderations regarding either retainers or security deposits. A fee advance is not a retainer given by the client to assure the attorney's availability and not necessarily related to the time expended on the client's matter. A fee advance is not a security deposit held by the attorney to assure the client's payment of legal fees and expenses and returned to the client upon payment in full.

APPLICABLE PROVISIONS.

DR 2-106 Fees for Legal Services.

(A) A lawyer shall nto enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

DR 2-107 Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:...

DR 3-102 Dividing Legal Fees with a Non-Lawyer.

(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:...

Opinion

The fee advance arises from a contractual agreement between lawyer and client. The fee advance provides the lawyer with money today for work he will do tomorrow. After the lawyer receives the fee advance, the lawyer does the work. Typically, lawyers seek fee advances when dealing with clients where no established relationship exists, where a client's past behavior raises concern about promptness of future payment or where substantial legal work will occur at the outset.

Prepayments are commonly made for many other types of goods and services. The recipient may immediately use the monies received. If the services are not performed or the product is not delivered then refunds or credits are generally required. Deposits for goods or services form an important part of the cash flow necessary to operate many enterprises. Attorneys generally use the fee advance in the same manner as commercial enterprises.

Fee provisions place no special limitations on handling of fee advances

The only Code provision dealing directly with fees for legal services does not place any limitations on fee advances. DR 2-106, *Fees for Legal Services*. The Code does not specify when an attorney may collect a fee. The Code does not differentiate between a fee collected in advance of the performance of services and a fee collected after some or all of the services are rendered. The central ethical limitation on the fee agreement is that "a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." DR 2-106.

The Code recognizes the existence of fee advances by implication: "A lawyer who withdraws from employment shall refund promptly any part of a *fee paid in advance* that has not been earned." (Emphasis added.) DR 2-110, *Withdrawal from Employment*. At the least, this language does not suggest any restriction on the attorney's use of the fee advance while in his possession. The matter of fact reference to the lawyer's "refund" suggests the money is returned from the lawyer's account to the client, not from an escrow or separate account. Code restrictions on the use of fees exist but none address fee advances. See, DR 2-107, *Division of Fees Among Lawyers;* DR 3-102, *Dividing Legal Fees with a Non-Lawyer*. Thus, if the Code intended a restriction on the use of fee advances, specific restrictions on the use of fee advances, specific restrictions would exist in the provisions governing fees. None do.

Fee advances are not "funds of a client."

We reject the view that fee advances are

[1]DR 9-103 is the identical provision formerly numbered DR 9-102. The renumbering occurred as a result of other Code changes under Canon 9. See DR 9-101, footnote at P. 51, District of Columbia Code of Professional Responsibility (1982).

"funds of a client" and therefore subject to those restrictions. DR 9-103[3] Generally, "funds of a client" are monies received by an attorney from a third party for the benefit of a client or from a client for the benefit of a third party other than the attorney. Some portion of these funds may undoubtedly be used to satisfy the lawyer's fee. Typically, these funds are properties of the client received from the sale of assets or settlement of a claim or estate and held temporarily by the attorney where the temptation for the attorney to sue or confuse the client's assets with his own must be avoided. Hence, the detailed requirements for segregating and safeguarding these properties.

DR 9-103 was not intended to govern fee advances. The term "fee" does not appear anywhere in DR 9-103, entitled *Preserving Identity and Funds of a Client*. By contrast, the term "fee" is used wherever the regulation of fees is discussed. DR 2-106, *Fees for Legal Services;* DR 2-107, *Division of Fees Among Lawyers;* and DR 3-102, Dividing Legal Fees With a Non-Lawyer. Moreover, when the Code specifically addresses fee advances it uses the term: "A lawyer who withdraws from employment shall refund promptly any part of a *fee paid in advance* that has not been earned." (Emphasis added.) DR 2-110, *Withdrawal from Employment*. The absence of any reference to "fees" in a lengthy detailed provision means that the Disciplinary Rule is not intended to regulate fees. DR 9-103. Indeed, the presence of specific instructions for safeguarding funds, securities, and other properties and regulating their flow from third parties to the client with the attorney as conduit further establishes that fee advances are not among the practices addressed. Under DR 9-103 an attorney may have a claim against some of the "funds of a client" but only if the client agrees to the attorney's removal of the funds from the trust account. DR 9-103(A)(2) gives the client a veto power over the attorney's drawdown from any trust money which otherwise belongs to the client. Both the client and attorney thus have control over the trust and its distribution and will usually have a common interest in quickly resolving how the trust is distributed. Both parties have an interest in reaching an accommodation. Any requirement for a trust over an attorney's fee advance which required the client's assent for a drawdown would give substantial power to the capricious client with no countervailing interest to act reasonably. Any escrow or trust requirement over the fee advance would defeat the objective of the fee advance: to take the attorney away from the financial mercies of the client.

Burdensome administrative requirements argue againsts special treatment for fee advances.

Policy considerations support the status quo. Current fee advance practices permitting the commingling of fee advances for the firm's general use operate without evidence of popular discontent. Admittedly, a lawyer bankruptcy could cause a client to wait in line with other general creditors. also a dishonest lawyer could accept the fee advance but fail to perform services. The Client Security Fund is devoted to reimbursing clients who suffer from attorney dishonesty.

Imposing an escrow account requirement for every fee advance would only create pitfalls for the honest but less than perfectly vigilant attorney. To work perfectly an attorney could only drawdown a dollar after each dollar's worth of fee is earned. Considering the worst case scenarios, if a lawyer slightly overdraws an escrow, he may have committed a fiduciary breach, an ethical violation which restoration of the overdrawn funds will not remedy. Accounting costs would certainly increase, but to no particular benefit of the attorney or client. The allocation of interest earned on numerous escrow account would create additional burdensome accounting problems. To lessen the burden, attorney and client would probably in exasperation agree to place the funds in non-interest bearing accounts, benefitting only the bank. In short, no persuasive policy reasons exist to impose these burdens on attorneys.

Dissent to Opinion No. 113

We believe that the majority has construed DR 9-103(A) in a fashion that conflicts with the plain language, the legislative history, and the intended policies of the Rule. As point three of the majority opinion candidly states, this result has been influenced by the view that a literal construction of the Rule would impose unjustifiably burdensome accounting procedures on atorneys. This policy concern may or may not have merit. However, we believe that this Committee is constrained to interpret the Code as it is written. When a literal interpretation leads to an undesirable result, we believe that it is more appropriate for this Committee to propose an amendment to the Rule than to construe it in a fashion that conflicts with the Rule as presently written.

At the outset, it is useful to restate the two inquiries which gave rise to his opinion. Law firm A follows the practice of entering into agreements with clients under which the firm estimates the number of hours required to handle a case, and the client advances approximately 50% of the estimated fee. These advances sometimes amount to several thousand dollars. As time and expenses on the matter are billed, they are charged against the advance. A inquires whether these advances must be placed in an escrow account if it is expected that the sum will not be exhausted in less than a month from the date of payment. If such an account is required, A additionally asks whether it must be placed in an interest bearing account. Law Firm B frequently receives advances from clients for services to be performed in the future and incidental expenes incurred in performing such services. These sums range from $150 to $1000 or more. B's practice is to deposit these advances in a non-interest bearing bank account and to draw on the advance only after services have been performed or expenses incurred. B asks (1) whether the firm may deposit these advances in an interest bearing account, and (2) if it does, whether the firm may retain the interest earned on the account prior to withdrawal of the appropriate sum for services performed or whether such interest must be credited to the client. Additionally, if the occasion arises for B to refund an advance or portion thereof to a client, the firm asks whether the interest on that sum must also be refunded to the client. Both inquirers state that if the full amount of the advance is not expended, the remainder is either returned to the client or held for use as an advance on a subsequent matter.

We believe that DR 9-103(A) requires that advances on fees which are not charged to the client until services are performed must be deposited in a separate bank account and must not be commingled with the firm's funds prior to performance of the services.[1]

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[3]DR 9-103 *Preserving Identity of Funds and Property of a Client.*

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
  (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
  (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:
  (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
  (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
  (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
  (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

[1]We agree with the majority that these inquiries do not involve retainers paid by a client to insure

However, advances on anticipated costs and expenses need not be separately maintained. The answers to the inquirer's questions concerning whether advances on fees must or may be deposited in an interest bearing account and whether the law firm may keep the interest should be answered by Opinion 102.[2] However, since the majority holds that fee advances are not funds of a client, there is no obligation to segregate advances. Thus, if advances are placed in an interest bearing account, the attorney is free to keep the interest even though he has done no work to earn the principal.

Before setting forth our reasoning, we wish to outline the history of the Committee's consideration of these inquiries. At one point, the dissent's construction of DR 9-103(A) commanded a majority of the Committee and what is now the majority position was set out in a dissent. However, because the Committee was closely divided on the issue and because we recognized that this may be a matter of broad interest to the Bar, we voted in May 1981 to publish the majority and minority positions in draft form for public comment rather than to adopt the then-majority position as the Committee's opinion.[3] The two positions were published in the July-August 1981 edition of *The District Lawyer*, and five comments were received. The comments were all in support of the then-minority position and stressed the burden that would be imposed by the then-majority position. After further discussion on November 24, 1981, the entire membership of the Committee was polled on the question of whether to adopt the then-majority position. At that point, it failed to command a majority of the Committee and therefore was rejected.[4] A new opinion representing the former minority view was then drafted and adopted on May 14, 1982, by a vote of nine to four, with one abstention.[5]

DR 9-103(A) requires that "[a]ll funds of clients paid to a lawyer or law firm, other than advances for costs and expenses" shall be maintained separately from the lawyer's funds. The issue raised by these inquiries is whether this Rule applies to advances on fees. The resolution of this issue turns on whether such advances come within the meaning of "all funds of a client paid to a lawyer or law firm." The majority limits this term to certain funds such as those for a real estate closing, the settlement of a claim, or a money judgment that are given to a lawyer clearly to be held in trust for the client. However, we believe that the plain language of DR 9-103(A), its legislative history, and the policies underlying the Rule compel the conclusion that it applies to all funds of a client, including fee advances.

As a textual matter, DR 9-103(A) applies to "all funds of clients" except "advances for costs and expenses." The categorical nature of the first term combined with the limited nature of the exception persuades us that "all funds of clients" include funds paid in advance to cover legal fees. We do not think that the drafters of the Code would have used such an all-inclusive term if in fact they had intended to reach only limited categories of clients' funds. Moreover, the exception which the drafters wrote into the Rule is a narrow one which does not in its accepted usage include attorneys fees and the costs and expenses incident to litigation or other legal work. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 420 (1975). *See* 28 U.S.C. § 1920. Accordingly, we do not think that the authors of the Code would have lossely used "costs and expenses" if they had intended to exclude advances for fees from the requirement of separate maintenance of all funds of clients. If the drafters of the Code had intended to except fees as well as costs and expenses, they would have included fees in the exception.[6]

Support for our view that advances should be separately maintained also appears in the language of DR 9-103(A)(2) which provides that "[f]unds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be depositied" in a separate account. By speaking of funds which "potentially" belong to the lawyer, this provision appears to anticipate the practice which the inquiring firms follows. At the time the advance is tendered by the client, the lawyer has not yet earned it, and the money is only potentially his in the event he bills time to earn it. *See* DR 2-110(A)(3). Conequently, it must be deposited in a separate account.

There is nothing in the legislative history of DR 9-103(A) to suggest that "funds of clients" does not cover payments advanced against fees. ABA Canon 11 provided that "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or used by him." This provision not only reached traditional trust funds and funds collected for the client, but also any "money of the client."

Footnote 10 to DR 9-103(A) indicates that the model for the rule was section 6076 of the California Business and Professions Code. That statute provided in petinent part that "a member of the State Bar shall not commingle the money or other property of a client with his own. . . ." As with Canon 11, there is no indication that "money. . . of a client" was intended to have less than its literal meaning.

The policies underlying the prohibition against commingling also support the result we reach because these policies apply as equally to advances for fees as to any other funds of a client which come into an attorney's hands. These policies are summarized in a California Supreme court decision which is cited in the footnote to DR 9-103:

> Commingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to cliams of his creditors. . . . The rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money.

Black v. *State Bar*, 57 Ca. 2d 219, 225-226, 368 P.2d 118, 122, 18 Cal. Rptr. 518, 522 (1962). *See* EC 9-5.

If advances for fees are not separately maintained, all of the dangers of commingling are present. The layer may use the money for his own purposes or the money may be subject to claims of the lawyer's creditors before the lawyer performs the services to earn the fee. If the Code prohibits commingling of traditional trust funds in order to avoid these dangers, it is reasonable to conclude that the Code also prohibits commingling of advances in order to avoid an identical danger. It may well be that the traditional policy against commingling is unsound, for few lawyers go bankrupt and a determinedly dishonest lawyer will cheat his client in any event. That critique applies with equal force to the policy against com-

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the availability of a lawyer's services where the lawyer is entitled to sum regardless of whether he actually renders any services. In that situation, the lawyer has earned the money upon receipt by promising to be available to perform legal work. Since the money has been earned by the lawyer, there is no obligation to maintain it separately. Here both inquiring law firms indicate that under the terms of their agreements with their clients, the money is advanced only to cover work that is performed in the future, and the money is returned to the client if the work is not performed.

[2]In that opinion the Committee concluded that the question of whether a client's funds are to be deposited in an interest earning account is a matter which should be left to the client's choice after the lawyer discusses with the client the advantages and disadvantages in each particular case. If an interest earning account is established, interest earned on sums which have not yet been expended for services rendered must be credited to the client and not to the lawyer.

[3]Part F of the Committee's Rules provides for public notice and comment with respect to opinions of broad scope.

[4]Rule F-2 requires that an opinion of broad scope must be approved by an absolute majority of all members of the Committee and that the vote shall be taken by mail ballot.

[5]Since the new majority opinion was not deemed to be of broad scope, it required only a majority of the members present at that meeting. Rule E-6.

[6]A broad construction of "all funds of clients" and a narrow construction of the exception for "advances for costs and expenses" is also suggested by the decision in *State of Kansas* v. *Hilton*, 217 Kan. 694, 538 P.2d 977, 983 (1975), where the Court ruled that payment of a sum to a lawyer to be used for a "probation bond" was not a cost or expense of litigation within the meaning of DR 9-102 and should have been separately maintained.

mingling the types of funds which the majority agrees must be separately maintained and leads to the conclusion that any rule against commingling is pointless. That argument, however, is properly addressed to the body that drafts the Code rather than the body that interprets it as this Committee is charged to do.

Thus far, we have based our position solely on the language of the DR 9-103(A) and its legislative history. However, we agree that when these sources of interpretation lead to a truly absurd result, the Committee has some latitude to ignore them and adopt a reasonable construction of a Code provision But requiring fee advances to be maintained separately, while concededly burdensome to a degree, is not absurdly burdensome. We say this with confidence, for in the Committee's discussions of this issue we learned that several of our members' firms do in fact segregate fee advances, and others felt that they could do so without undue burden. Moreover, when this matter was opened to comment from the bar at large, it elicited only five comments—a small number which seems to indicate that our approach would not unduly disrupt the practice of law in this jurisdiction. Thus, we believe that literal adherence to 9-102(A) does not lead to such an unreasonable result that we are free to ignore the plain language of the Code.

It is also true that many lawyers do not segregate fees advances and some feel very strongly that such a requirement would be very burdensome. Consequently, it appears that there are legitimate policy considerations in favor of a rule that does not require advances to be separately maintained, but that is not the rule which is now in the Code. It is also true that—apart from the question of the proper construction of the Code provisions—some feel as a policy matter that attorneys should not be allowed to use or invest money which they have not yet earned. The tension between these two policies, combined with what the plain language of the Code now dictates, presents an appropriate situation for this Committee to recommend a revision in the Code rather than to adopt a construction that departs from the Code as it presently is written.[7] For the foregoing reasons, we dissent from the majority's opinion.

Opinion No. 114

DR 9-101(A), EC 9-6, Canon 9—Representation of Agency Officials Before Whom A Lawyer May Appear on Behalf of Other Clients

Synopsis

In our Opinion 101 (May 22, 1981) we concluded that a lawyer employed by a federal agency was not barred by any disciplinary rule from appearing before quasi-judicial officials of that agency whom he personally represented in a then-pending suit for damages arising out of the performance of their duties as agency officials. In a Separate Statement appended to the Opinion, we also outlined considerations that might lead those officials to recuse themselves from matters in which the attorney appeared as counsel. In the present Opinion we address the question or whether a private attorney may accept representation of government officials in a challenge to reclassification of their civil service grade when he regularly appears before officials of that agency who might be affected by the reclassification proceeding, including, potentially, individual officials he has been asked to represent. Consistent with Opinion 101, we conclude that acceptance of such representation is not absolutely barred by any disciplinary rule, but we refer to the risk inherent in the contemplated representation that such representation may, even without intending to do so, result in a violation of DR 9-101(A), as well as the admonition of Canon 9 that "A lawyer should avoid even the appearance of professional impropriety." We also reiterate that considerations outlined in our Separate Statement appended to Opinion 101 may lead affected officials to conclude that they must recuse themselves from proceedings in which the lawyer appears.

Facts

The inquiring attorney has received a request from approximately forty officials of the regulations and rulings office of a federal agency that he represent them in attempting to prevent adverse reclassification of their civil service grade. The officials seeking such representation are a majority of the officials in the office, and all officials so-employed may potentially be affected by the reclassification proceeding.

The officials in question are not judicial officers, but they do perform some quasi-judicial and discretionary functions, including drafting rulings and regulations, preparing responses to petitions made to the agency and rendition of advice concerning the laws and regulations administered by the agency. All of the officials are lawyers, and many are members of the D.C. Bar.

The inquiring attorney is a former official of the agency, has held office on the American Bar Association Committee relating to agency practice and regularly represents private clients before the office in which the officials seeking his representation are employed. Those officials seek the inquiring attorney's representation because of his intimate knowledge of the functions they perform and his good reputation and high standing in practice before the agency.[1] In the normal course of events it is to be expected that the inquiring attorney will continue to represent private clients before the agency and that he will appear before officials who seek his representation and before others who might be affected by such representation.

Question

In the circumstances described, is the inquiring attorney barred from accepting representation of the agency officials?

Discussion

We concluded in our Opinion 101 that there is no disciplinary rule that forbids a government attorney from appearing before quasi-judicial government officials in adversary proceedings when he was simultaneously providing personal legal representation to those officials in unrelated actions for damages arising out of performance of their official duties. For the reasons discussed in that opinion, it follows that there is no absolute bar to a private attorney providing personal representation to government officials and later appearing before them in unrelated actions. As in Opinion 101, we are not prepared to accord the aspirations expressed in Canon 9 and in Ethical

[7]The difficulties in construing DR 9-103(A) and the policy conflicts involved are further demonstrated by the contrary results reached in other jurisdictions. The Iowa Client Security and Attorney Disciplinary Commission has decided that fee advances should be retained in trust accounts until earned by the lawyer. Note, *Attorney Misappropriation of Clients' Funds: A Study In Professional Responsibility*, 10 U. of Mich. J.L. Ref. 415, 436 N.135 (1977). On the other hand, the Professional Ethics Committee of the Florida Bar has construed DR 9-103(A) to mean that clients are presumed to intend that advance payments for legal services to be performed in the future will be the lawyer's property unless there is evidence that the advance was intended and designated as a "fee security" deposit. *Id.* In promulgating a detailed guideline to DR 9-103, the Delaware Supreme Court, acting on the recommendation of a bar advisory committee, declined to address the issue of whether advances on fees must be separately maintained because of the difficulty of the issue. Carpenter, *The Negligent Attorney Embezzler: Delaware's Solution*, 61 A.B.A.J. 338, 340 (1979). *See* Note *supra*, 10 U. of Mich. J.L. Ref. at 436.

[1]We assume for the purpose of this Opinion that provisions 18 U.S.C. § 207 and DR 9-101(B) relating to disqualification of former government officials are inapplicable.

Consideration 9-6 the effect of disciplinary rules, but we must observe that, in our view, the aspirations stated in the Canon and in EC 9-6 should cause a lawyer to be very hesitant to accept the representation described.

There are, indeed, special risks inherent in the facts of this particular inquiry that require thoughtful consideration. These risks arise from the fact that the contemplated representation involves a "majority" of a relatively small number of officials of the office in question and that, because of the nature of a position reclassification proceeding, *all* of those officials may be affected by the representation of some of them.

The first consideration is Disciplinary Rule 9-101(A). That Rule provides: "A lawyer shall not state *or imply* that he or she is able to influence improperly, or upon grounds irrelevant to a proper determination on the merits, any...public official." (Emphasis added.) We have no reason to believe that the inquiring attorney has any intention to engage in conduct violating this prohibition, and we do not presume in advance that any such violation will occur. Nevertheless, we believe that representation by the inquiring attorney of a "majority" of the limited number of officials employed in the agency office in an action that may benefit all officials of that office creates a considerable risk that, even without intending to do so, a forbidden implication of ability to exercise improper influence over the actions of the office will be communicated to existing and potential clients, adversaries or members of the public.

Not having specific facts before us to evaluate, we do not go so far as to conclude that violation of DR 9-101(A) is inherent in the situation. However, the risk of violation appears to us to be sufficiently great that a conclusion by the inquiring attorney that it would be prudent for him to decline the contemplated representation would certainly be justified. We are, of course, aware that there is a strong interest in providing members of the public with counsel of their choice, but that interest may properly take second place to avoiding circumstances that make it difficult to avoid inadvertent violation of the disciplinary rules or which are antithetical to the considerations of public respect for the law, lawyers and the legal process embodied in Canon 9 and EC 9-6. Moreover, in this case the inquiring attorney may be the first choice of the officials in question, but there is no indication that he is the only attorney that can provide them with effective representation.

The second consideration is the question of what action should be taken by an agency official affected by the reclassification proceeding if the inquiring attorney chooses to undertake the representation and later appears before him. As in Opinion 101, we do not presume to provide a definitive answer to the question, but we refer to the Separate Statement appended to that opinion which discusses the obligations of quasi-judicial officials to recuse themselves when their impartiality might be questioned. Although the officials involved in this inquiry are not judges, as lawyers they should be guided by the principles embodied, respectively, in Canons 1, 5 and 9 of the Code of Professional Responsibility to "assist in maintaining the integrity...of the legal profession," to "exercise independent professional judgment on behalf of a client" and to "avoid even the appearance of professional impropriety," as well as the other considerations described in some detail in the Separate Statement. Consideration of those principles, may, in turn, lead officials directly represented by the inquiring attorney, or even his passive beneficiaries, to recuse themselves from matters in which the attorney appears. As also indicated in Opinion 101, in any matter in which the inquiring attorney appears before an affected official in an adversary proceeding, he should give notice to his adversary of the fact and nature of his representation of agency officials in the reclassification matter so that an informed decision whether to request recusal can be made.[2]

Opinion No. 115

EC 2-20, EC 5-7, DR 2-106, DR 5-103— Propriety of Contingent Fees in Non-Litigation Matters

Synopsis

Unless otherwise precluded, contingent fees are not improper in non-criminal matters which do not involve the likelihood of litigation. The attorney must be careful, however, that the amount of the contingent fee is not excessive and that the fee comprises compensation only for legal services.

Inquiry

The inquiring attorney seeks guidance on the propriety of entering into contingent fee contracts with clients who need assistance on legal matters not involving litigation. The attorney has provided two examples of such matters. One involves the "location or proof of ownership of assets possibly held in the United States and abroad." The second involves the need of performers, artists, athletes, and others for copyright, contract negotiation, and other legal services early in their careers before they are able to pay for such legal services. With respect to the first example, the Committee assumes that the contingent fee contract would call for payment to the attorney of a percentage of the value of the assets shown through the attorney's legal services to belong to the client. With respect to the latter example, the inquiring attorney suggests that the contingent fee contract could provide for payment to the attorney of "a percent of the entertainer's ultimate contract amount or revenues earned from these services."

Discussion

Under the Disciplinary Rules contingent fees are clearly prohibited only in one situation—criminal cases. DR 2-106(C) unequivocally provides, "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." Otherwise, DR 5-103(A)(2), it seems to us, clearly allows an attorney to "[c]ontract with a client for a reasonable contingent fee in a civil case" without violating the fundamental prohibition in DR 5-103(A) against acquiring "a proprietary interest" in a client's matter. We realize that Ethical Consideration 5-7, from which DR 5-103(A) derives most directly, refers primarily to "litigation." On the other hand, the fullest discussion in the Code of Professional Responsibility of contingency free arrangements is found in EC 2-20, in which it is observed:

> Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. [footnote omitted]

Consequently, the Committee believes that contingent fee arrangements in the situations presented by the inquiring attorney are not prohibited *per se* by the Disciplinary Rules of the Code of Professional Responsibility and are not inconsistent with the aspirational provisions found in the Code's Ethical Considerations.[1] This assumes, of

[2]Not wishing to speculate concerning facts not before us, we will not venture to determine what ethical considerations the inquiring attorney might face if all officials of the office in question were to conclude that they must recuse themselves from matters in which the inquiring attorney appears. We, nevertheless, note that DR 1-102(A)(5) forbids a lawyer to "engage in conduct that is prejudicial to the administration of justice," DR 7-101(A)(3) provides that "A lawyer shall not intentionally...prejudice or damage his client during the course of the professional relationship...., and DR 2-110(B)(2) requires that "a lawyer representing a client...shall withdraw from employment if...he knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule."

[1]The sparse authority directly addressing this issue is consistent with our conclusion. For example, in *Todd* v. *City of Visalia,* 254 Cal. App.2d 679, 2 Cal. Rtr. 485 (Court of Appeals, 5th Dis. 1967), the Court labeled as "completely devoid of merit" a contention that a contract between the City of Visalia and an attorney in private practice

course, that the attorney has also complied with the disclosure requirements of DR 5-101(A) to the extent that this provision may be implicated in a particular situation.

The Committee notes, however, that contingent fee arrangements in some circumstances have the potential, unless the contingent fee contracts are very carefully drawn, of precipitating questions about the reasonableness of the contingent fee. It is important to remember that:

> The historical bases of their [i.e., contingent fees'] acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one has a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement.
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> But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

(EC 2-20; EC 5-7). These Ethical Considerations, like the more concrete factors and guidelines specified in DR 2-106(B),[2] should inform a lawyer's own evaluation of whether his or her fees in a particular matter are "clearly excessive" in violation of DR 2-106 (B). The Committee on Professional Ethics of the New York State Bar Association has stressed the importance of contingent fee arrangements being "openly arrived at by parties knowledgeable about such matters. . . ." (*Id.*, n.1., *supra.*) We agree that a fee is all too likely at least to appear to be unreasonable or clearly excessive to a party at some later point if that party in fact is not "knowledgeable about such matters" at the time of the making of the fee contract.

It seems to the Committee that in the first example provided by the inquiring attorney, establishment of a contingent fee which is not clearly excessive is not likely to present any unusual problems. The second situation, however, may entail substantially greater difficulties and concomitant risks. For example, a person just embarking on his or her career, because of youthfulness or other factors, may be quite naive about contingent fee matters. Of even greater concern potentially, it may be very difficult to determine exactly which "revenues" (especially if accruing over substantial periods of time) have actually resulted from the legal services of the inquiring attorney and therefore should serve as the basis for determination of the contingent fee.[3] A corollary of this problem is distinguishing legal services from other services. For example, in *Brillhart* v. *Hudson*, 455 P.2d 878 (Colo.), the attorney-plaintiffs, who were suing to recover their fee, had contracted with the defendant to represent him in the sale of lease-hold rights for a contingent fee of one-fourth of the proceeds of any such sale. The court held that the contingent fee called for in this contract was "grossly unreasonable" because:

> In the exercise of supervisory powers over attorneys as officers of this court, we cannot approve—under the guise of a "contingent fee" contract for legal services—the payment of what in fact amounts to a broker's commission of 25% of the purchase price. . . ."

Id. at 881. It seems to the Committee that in the context of performers, artists, and athletes, the same difficulty may arise of distinguishing between legal services, and other services of a non-legal nature.

All of these considerations, we believe, mandate caution in entering into a contingent fee contract in the second situation presented by the inquiring attorney.

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was improper because the attorney's maximum fee was contingent upon the City's success through his legal services in forming an improvement district; ". . . . it was not improper for him to secure a contingent provision based upon success." Similarly, the Committee on Professional Ethics of the New York State Bar Association responded affirmatively to the question of whether an attorney may be compensated on a contingent fee basis to "process an application for a rate increase before an administrative agency or other public body?" The Committee explained:

> Even though the historical rationale for permitting contingent fees relates primarily to making legal services available to those who cannot afford them, contingent fees have become an accepted practice.

(*Id.*, Opinion No. 390 (March 21, 1975), in 47 N.Y.S.B.J. 426 (1975)).

[2]DR 2-106(B) provides:

A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

[3]Elsewhere in his letter, the inquiring attorney commendably seems to recognize that the assets or earnings subject to the contingent fee would be only those "facilitated by the legal services provided. This not to ignore, however, that "facilitated" is surely much too vague a term for defining the *res* on which the contingent fee would be based.

Opinion No. 116

DR 2-103, DR 2-104; DR 6-101(A)(3); DR 7-101(A)(1)—Unsolicited Legal Advice; Obligation to Revise Wills

Synopsis

In ordinary circumstances, a lawyer who drafts a will for client is not ethically obligated to inform the client of subsequent changes in the law which might make a change in the will desirable. However, where the client has entrusted his or her estate planning to the lawyer on an ongoing and continuous basis, such an obligation does arise. On the other hand, where there is no obligation to contact former clients, there is no ethical prohibition against informing them that they may want to consider amending their wills because of a change in the law.

Inquiry

We have been asked to consider whether a lawyer who drafts a will has an ethical obligation to contact and advise the testator when the lawyer becomes aware of a change in the law that requires a change in the will in order to enhance or protect the testator's interests. This inquiry was triggered by the enactment of a provision in the Economic Recovery Tax Act of 1981 which increased the allowable marital deduction for purposes of federal estate tax. In order to invoke this change in the law, a testator is required to amend his will to state that he intends the new deduction to apply to his estate. The specific question is whether a lawyer is required to contact, or attempt to contact, all the people for whom he has drafted wills to advise them of the new deduction.

Discussion

Except in those situations where a client has entrusted his or her estate planning to a lawyer on a continuous and ongoing basis, we conclude that lawyers are not ethically obligated to contact all the clients for whom they have drafted wills. However, the disci-

plinary rules concerning soliciting professional employment and suggesting the need for legal services do not bar lawyers from contacting testators to advise them that they may want to consider amending their wills. *See* DR 2-103, DR 2-104.

Two disciplinary rules are arguably relevant to this inquiry. DR 6-101(A)(3) provides that "[a] lawyer shall not... [n]eglect a matter entrusted to him." DR 7-101(A)(1) provides that "[a] lawyer shall not intentionally... [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules...." However, neither of these rules imposes on a lawyer a duty to seek out a client who has employed the lawyer for the sole purpose of drafting a will to advise the client that subsequent changes in the law may make a change in the will desirable.

We do not think that in the usual circumstances a person who retains a lawyer to draft a will also "entrusts" his or her subsequent estate planning to the lawyer within the meaning of DR 6-101(A)(3). Nor do we think that the duty of zealous representation imposed by DR 7-101 requires a lawyer to search out all those for whom he has drafted a will. The drafting of a will is often a discrete matter, and once the lawyer accomplishes this task, he has performed the duties which can reasonably be expected of him.

However, if it can fairly be said that the client has entrusted his estate planning and related affairs to the lawyer on an on-going and continuous basis, then the lawyer has an ethical obligation to keep himself informed of relevant changes in the law and to advise the client whenever such a change affects the client's interests.[1] Several Ethical Considerations are relevant when a lawyer is entrusted with a matter and provide content to the disciplinary rules. EC 6-2 encourages lawyers to keep abreast of developments in the law, and, at a minimum, a lawyer should determine whether a well-publicized piece of legislation affects the matter that are entrusted to him. EC 7-8 states that "[a] lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." Accordingly, a lawyer should inform his client of relevant statutory changes. This Ethical Consideration also provides that "[a] lawyer ought to initiate this decision-making process if the client does not do so." Thus, a lawyer who is entrusted with a client's estate planning should take the initiative in bringing statutory changes to the client's attention. We also note that EC 7-11 provides that "[t]he responsibilities of a lawyer may vary according to the intelligence, experience, mental condition, or age of a client...."

Inquiry No. 81-9-26
October 19, 1982

[1]As we have stressed in a variety of contexts, the surest way to avoid ambiguity over what a lawyer has undertaken to do for a client is to execute a written retainer agreement. Opinions 103, 37, 29, 25, and 4. *See* EC 2-19.

Opinion No. 117

DR 2-101 (C)(3)—Statement as to Quality of Legal Services in Advertisement

Synopsis

A law firm's advertisement that it provides "quality legal services" violates DR 2-101(C)(3) because the phrase "quality legal services" conveys an implication regarding the quality of legal services to be provided which is not susceptible of reasonable verification by the public.

The Inquiry

The inquirer has asked whether a newspaper advertisement captioned "Quality Legal Services at Affordable Prices" violates Disciplinary Rule 2-101(C)(3). The advertisement, which appeared in a daily newspaper of general circulation, contained much additional information, including a list of fees charged for particular services, locations of offices, office hours, office telephone numbers, and the trade name of the office, but the phrase in question appeared in capital letters at the top of the advertisement in a larger type face than any other content of the advertisement.

Discussion

DR 2-101(C)(3) provides in relevant part:

> "A lawyer shall not, on his or her own behalf,... use... any form of public communication which... contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public."

The Rule in its present form was adopted by the District of Columbia Court of Appeals on July 12, 1978, and has no counterpart in the American Bar Association Code of Professional Responsibility.

The Committee has had no previous occasion to apply DR 2-101(C)(3), but in a footnote to our Opinion 95 it was observed that "it is the Committee's view that an advertisement by an attorney of a specialty based on the attorney's claim of a 'special competence' in an area [of practice] would violate DR 2-101(C)(3)...." In so doing, the Committee retracted as "ill-advised" a suggestion made in Opinion 70 that a lawyer might represent himself as a specialist based on a claimed "special competence."

The Committee is acutely aware that any rule that seeks to regulate speech encroaches on a constitutionally protected field. *See Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). Nevertheless, we are unaware of any opinion of the Supreme Court of the United States or of the District of Columbia Court of Appeals that squarely condemns the rule in question. The majority opinion in *Bates* makes clear that some regulation of commercial advertising is permitted and explicitly left open the question whether restrictions might properly be placed on representations concerning the quality of legal services. Indeed, the Supreme Court singled out representations concerning quality of legal services as perhaps a peculiarly appropriate subject for regulation:

> "[W]e need not address the peculiar problems associated with advertising claims relating to the *quality* of legal services. Such claims probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false.... Accordingly, we leave that issue for another day.
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> "In holding that advertising by attorneys may not be subjected to blanket suppression..., we, of course, do not hold that advertising by attorneys may not be regulated in any way.... [T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.... In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." *Id.*, 433 U.S. at 366, 383–84 (emphasis in original). *See also In re R.M.J.*, ___U.S.___, 102 S. Ct. 929, 936 (1982).

In any event, consistent with its own internal Rule C-5, it has been the practice of this Committee not to render opinions on questions of law. Thus, absent any authoritative ruling of unenforceability, we see it as this Committee's proper role to apply and interpret DR 2-101(C)(3) as we find it, without venturing an opinion as to its constitutionality.

At the time of their promulgation, the Disciplinary Rules of the District of Columbia relating to advertising were among the most permissive in force in the country. In many respects they still are. Thus, we do not find DR 2-101(C)(3) to be grounded in an antagonism to advertising by lawyers as such.

It is important in this context to recognize that the Court of Appeals did *not* forbid representations as to quality altogether. Rather, it forbade only such representations relating to the quality of legal services which are "not susceptible of reasonable vertification by the public." Thus, consistent with the suggestion in the *Bates* opinion, it appears clear to us that the Rule is intended to serve the prophylactic purpose of protecting

unsophisticated members of the public from advertising concerning the quality of legal services that they are unlikely to be able to evaluate.

With these principles in mind, our task in applying DR 2-101(C)(3) to a particular advertisement is to determine (1) whether the advertisement conveys a "representation" or "implication" regarding the quality of legal services and, if so, (2) whether the representation or implication conveyed is "susceptible of reasonable verification by the public."

We find that the advertisement at issue does convey an "implication" regarding the quality of legal services. True, the use of the word "quality" standing alone does not make a direct representation that the legal services offered by the advertiser are of higher or better quality than those offered by other attorneys. Nevertheless, we believe it would be ignoring the obvious to conclude that such an "implication" is not conveyed. We believe it a fair and obvious conclusion that by describing itself as providing "quality legal services" the advertiser does convey the implications (1) that not all legal services are "quality legal services," (2) that the advertiser provides legal services of a quality higher than that minimum level of competence required of all legal practitioners and (3) that the quality of service provided by the advertiser is, therefore, differentially higher than that provided by others. Thus, we see no escape from the obvious conclusion that a statement by an advertiser that it offers "quality legal services" contains an "implication regarding the quality of legal services" provided.

It also seems apparent to us that the implication conveyed is "not susceptible of reasonable verification by the public." By "reasonable verification," we understand the Court of Appeals to mean something that is capable of being confirmed *before* a member of the public retains the advertiser. Any other meaning, it seems to us, is inconsistent with what we understand to be the protective purpose of the Rule.

We believe the public is capable of verifying statements of concrete fact that may bear on the quality of legal services provided, such as, for example, the number and locations of offices, the jurisdictions in which attorneys are admitted to practice, an attorney's educational background and achievements, fields of practice in which attorneys are engaged and the like. But, a mere statement that "quality" legal services are provided conveys no concrete facts that can be verified short of retaining a lawyer and learning the truth or falsity of his representation by personal experience. It is our understanding of DR 2-101(C)(3) that this is precisely the type of circumstance the Rule is intended to prevent. For that reason we conclude that a statement made in an advertisement that the advertiser provides "quality legal services" would violate DR 2-101(C)(3).

Inquiry No. 82-10-15
December 14, 1982

Opinion No. 118

DR 6-101(A)(3), DR 7-101(A)(2), DR 7-101(A)(3), DR 2-110(A)(1), DR 2-110(A)(2), EC 5-13—Responsibilities of Lawyer Represented By Collective Bargaining Unit During Strike or Work Slowdown

Synopsis

An attorney owes his clients the same degree of competent representation and the same degree of independent professional judgment without regard to whether the attorney is represented by a collective bargaining unit and without regard to whether the collective bargaining unit has called for a strike or work slowdown.

Facts

This inquiry raises questions concerning the ethical responsibilities of an attorney who serves his client as an employee rather than as independent outside counsel. Inquirer is employed by Union X as a staff attorney and, in that capacity, provides legal services both to the union and to its individual members. At the same time, inquirer belongs to a collective bargaining unit represented by Union Y. With exceptions not applicable here, the bargaining unit includes all professional and non-professional employees of Union X.

Inquirer raises several questions concerning the responsibilities of the Union X staff attorneys should Union Y call for a strike or work slowdown. This matter came to the Committee as a request for an expedited opinion at a time when negotiations between Unions X and Y were near impasse. Although that particular impasse has been averted, the Committee has determined that the inquiry warrants an opinion because the questions raised may recur in future negotiations between Unions X and Y and therefore relate to projected conduct of the Union X staff attorneys. Committee Rule C-2.

Analysis

First, inquirer asks generally what the responsibilities of the Union X staff attorneys are if Union Y should call for a strike or work slowdown. This appears to encompass two separate questions: whether the Union X staff attorneys may continue membership in the collective bargaining unit and, if so, whether they may participate in the suggested job action.[1] As to the first of these, the ABA Committee has determined that "...lawyers are not forbidden *per se* to belong to unions, whether or not the union membership is limited to lawyers." (Informal 1325). Recently, however, this Committee has concluded that, in certain circumstances, a lawyer/employee may not function both as union member and as representative of the unionized employer. (Opinion 112). The key circumstance considered in Opinion 112 was that the union of which the attorneys were members was the "principal adversary" both in negotiations and in litigation of the attorneys' employer. The present inquiry was submitted before Opinion 112 was published and does not include facts sufficient for the Committee to determine whether the relationship between Unions X and Y is so consistently and extensively adversarial as to require the Union X staff attorneys to dissociate themselves from the collective bargaining unit. Thus, we simply raise the issue and refer inquirer to Opinion 112 for guidance.

Assuming that Opinion 112 does not affect inquirer's situation, we address the question whether a Union X staff attorney may participate in a job action called for by Union Y. The ABA Committee, in Informal Opinion 1325, concluded that lawyer participation in union activities, even to the point of striking, would possibly but not necessarily result in violation of a Disciplinary Rule. The relevant portions of that Opinion read:

> It is possible that a lawyer who is a member of a union or bargaining organization will not violate any Disciplinary Rule as a result of his membership....For example, in some situations participation in a strike might be no more disruptive of the performance of legal work than taking a two week's vacation might be....
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> Proper guidelines, therefore, for lawyers considering union membership or participating in union activities, are simply these: Lawyers who are union members are required, the same as all other lawyers, to comply with all Disciplinary Rules at all times; and lawyers who are union members should not permit the organization to prescribe, direct or suggest how to fulfill one's professional obligations, but should be vigilant at all times to safeguard one's fidelity to employer free from outside influences.

While we agree that it may be theoretically "possible" to engage in a job action without violating any Disciplinary Rule,[2] we think it unlikely that such a result would occur. The obligations of the Union X staff attorneys to their clients (and the procedures for terminating those obligations) are fixed

[1]Because the analysis in this opinion does not generally differentiate between "strike" and "work slowdown," we use the all-purpose term "job action" to refer to both situations.

[2]There may be situations in which a lawyer's participation in a job action would be of little consequence. For example, the job action may coincide with a general lull in a particular lawyer's practice or with an unexpected postponement of a matter scheduled to arise during the job action. We do not suggest, however, that a lawyer may

by the Code of Professional Responsibility; these obligations are undiminished during a job action. Thus, a Union X staff attorney who engages in a strike or work slowdown runs a high risk of violating DR 6-101(A)(3), "A lawyer shall not neglect a legal matter entrusted to him"; DR 7-101(A)(2), "A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services but he may withdraw as permitted...." and DR 7-101 (A)(3), "A lawyer shall not intentionally prejudice or damage his client during the course of the professional relationship...." Moreover, an attorney who engages in a job action may be effectuating a withdrawal from employment in violation of DR 2-110.

These potential Code violations would arise without regard to the motivation for the job action. Here the situation is exacerbated, and EC 5-13 is implicated, because the job action is undertaken at the behest of Union Y. EC 5-13 provides:

> A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

To summarize, the professional obligations of the Union X staff attorneys to their clients continue unabated during any job action and take precedence over the exigencies of membership in the collective bargaining unit. The staff attorneys may participate in a job action against their clients only if that participation in no way interferes with the timely and competent performance of the work.

This opinion has addressed only the question of the staff attorney's obligation with respect to pending matters for existing clients. The inquiry was so phrased and we have not attempted to discuss the numerous possibilities which may arise with respect to new matters and clients. However, we note generally that the ethical obligations which limit participation by the staff attorney in a job action arise upon the formation of an attorney-client relationship. If there is no attorney-client relationship, no legal matter has been entrusted so as to activate DR 6-101(A)(3) and there is no client to be disadvantaged under DR 7-101(A). Thus, for lack of a client, a Union X staff attorney may participate in the job action to the extent of not taking on individual union members as new clients.[3] The question of what might constitute a new matter between the union as client and its attorneys appears to be fact dependent and its resolution is beyond the scope of this opinion. However, we note that DR 2-110(A)(2) governs withdrawal from employment[4] and provides:

> (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

In addition to the general inquiry discussed above, inquirer asks a number of specific questions. Two relate to the mechanics of effectuating the job action. Thus, inquirer asks "What is the individual attorney's responsibility for a case where all pleadings are co-signed by the General Counsel and the General Counsel is informed that no further work will be performed on the case by the staff attorney during the strike?" and "Where only the staff attorney's name appears on the pleading can the attorney assign responsibility for handling the case to the General Counsel without leave of court and without the General Counsel filing an appearance in the case?"

Generally, the rules of the various courts set forth the procedures for an attorney to withdraw. Compliance with these rules has been incorporated into the Code of Professional Responsibility by DR 2-110(A)(1), which provides, "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission." Thus, whether or not a job action is pending, and whether or not the pleadings are co-signed, the Union X staff attorney may withdraw from a case only by complying with the applicable court rules.

Also, DR 2-110(A)(2) requires that a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including allowing time for employment of other counsel. If the entire work of a multi-lawyer office suddenly becomes the sole responsibility of one general counsel, it is reasonably foreseeable that he will be unable to competently handle the entire workload and, for this reason, the proposed delegation may constitute foreseeable prejudice in violation of DR 2-110(A)(2).[5]

Fourth, inquirer asks, "Is there any distinction to be made between cases where the client is an individual member and cases where the client is the union (either the national organization or a local or council)?" The minimum standards of representation set forth in the Disciplinary Rules to Canons 6 and 7 apply to all cases and all clients without distinction.

The final question posed is, "Are the rights of the attorneys under Section 7 of the National Labor Relations Act [29 U.S.C. §157] qualified by their professional responsibilities as lawyers?" The question of the possible preemptive effect of the National Labor Relations Act on the Code of Professional Responsibility (as adopted in the District of Columbia) with respect to strikes by union member/attorneys appears to present a question of law which is beyond the jurisdiction of the Committee. Without deciding the question, the Committee would note, however, that in numerous decisions the state's (or District's) interest in applying its law has been found to be sufficient to overcome all but those areas in which Congress has been explicit in its intent to preempt local law. Further, before the issue of which shall prevail need be faced, there must be no way to reconcile the Federal right of an attorney employee to engage in job actions and the attorney's professional obligations.

Inquiry No. 81-5-11
December 14, 1982

Opinion No. 119

DR 1-102(A)(5); DR 7-102(A)(3); DR 7-102 (A)(7); DR 7-109(A); DR 7-106(A); DR 7-101(A)(3); EC 7-3—Destruction of attorney memoranda to client which may be sought in pending or future litigation.

Summary

Intentional destruction of attorney memoranda which the attorney knows may be the subject of discovery or subpoena in pending or imminent litigation is conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5). In the absence of pending or imminent litigation, whether destruction of such memoranda violates any Disciplinary Rule depends on

initiate a continuance as part of a job action unless the continuance does not prejudice the client's interest.

Moreover, we do not regard a strike or work slowdown as comparable to a vacation in terms of the potential interference with the reliable provision of legal services. Vacations are scheduled with due regard for the foreseeable work load and are taken after arrangements have been made to cover pending matters. Vacations are predictable in duration and may often be interrupted—if only by telephone—for a client's emergency legal problem. In a job action, the lawyer proposes to rather abruptly interrupt the provision of legal services for an indefinite period and, except perhaps in the slowdown situation, without regard for the client's needs.

[3]In our view, if the union has an obligation to provide legal services to its individual members, that obligation may be fulfilled without reference to a specific lawyer.

[4]The Committee interprets "employment" as used in DR 2-110 and "contract of employment" as used in DR 7-101(A)(2) as referring not to the all-encompassing contract of employment between employer and employee but, rather, to the employment of an attorney in the more traditional sense of independent outside counsel.

[5]We do mean to imply that a lawyer-employee (whether or not a union member) cannot discuss the terms of his employment with his employer and, if the result is unsatisfactory, accept other employment after giving reasonable notice.

(1) whether there is a legal obligation to preserve the memoranda or (2) whether destruction of the memoranda would prejudice the client.

Facts

An attorney wishes to discard memoranda which were prepared and presented to his client in 1977, 1978 and 1979, and which he believes are protected by the attorney-client privilege. He believes that disclosure of the contents of his advice to his client could prejudice his client's interests. In a case which has since been settled the court ordered production of the memoranda, rejecting the argument that they were protected by the attorney-client privilege. Because of the settlement the memoranda were not produced. Another case against his client raises one of the same issues as the settled case and is still pending. There has been no request for the memoranda in the course of that case, and discovery has closed. The attorney considers it possible that further cases may be filed against his client in which further requests may be made for the memoranda.

The attorney inquires whether he would violate his ethical responsibilities by failing to retain the memoranda in question.

Discussion

1. *Pending Case*

The inquiry relates to both a pending case and possible future cases.[1] We first address the question of a lawyer discarding documents in order to avoid a potential obligation to produce them in a pending case. DR 1-102 is entitled "Misconduct." The fifth form of lawyer misconduct listed in the rule is contained in DR 1-102(A)(5): "a lawyer shall not . . . (5) engage in conduct that is prejudicial to the administration of justice."

a. Administration of Justice.

In order to determine the applicability of the rule we must first determine what is meant by "the administration of justice." The phrase is vague, and could arguably embrace virtually all activities of a lawyer. Such a broad reading of the phrase would render much of the rest of the rule superfluous and, indeed, much of the Code of Professional Conduct. However, the context, the case law and the history of DR 1-102(A)(5) suggest a narrower reading. Case law holds that statutes which forbid corruptly impeding the "administration of justice" apply to actions taken in the course of "some sort of judicial proceeding." See, *e.g.*, *United States* v. *Simmons*, 591 F.2d 206, 208 (3d Cir. 1979). While it is not entirely clear whether all such statutes apply to actions taken in the course of private civil litigation, DR 1-102(A)(5) applies to civil as well as criminal proceedings. See *Matter of Lieber*, 442 A.2d 154 (D.C. App. 1982) (disciplinary investigation); *Matter of Burka*, 423 A.2d 182 (D.C. App. 1982) (conservatorship); *Matter of Keiler*, 380 A.2d 119 (D.C. App. 1977) (arbitration). The phrase "administration of justice" is drawn from former ABA Canon 22, which required candor and fairness to the court and drew no distinction between criminal and civil proceedings. Indeed the other elements of old Canon 22 which now appear in ethical considerations and disciplinary rules under present Canon 7 have been applied to both criminal and civil proceedings. We conclude that DR 1-102(A)(5) prohibits misconduct by a lawyer that is prejudicial to courts' conduct of the pending civil litigation here.

(b) Prejudicial conduct.

The process of discovering and presenting evidence to the court is central to our system of justice. The destruction of potential evidence strikes at the heart of the litigation process. Thus, if there were outstanding discovery requests for the memoranda, destruction would obviously be prejudicial misconduct. The inquirer emphasizes that discovery in the case has ended, but where, as here, the lawyer knows the document is potentially relevant evidence, the possibilities that discovery could be reopened or that the memoranda could be subpoenaed at trial strongly suggest a continuing threat of prejudice from destruction of these documents. Indeed, a purpose of destruction would be to avoid production in the pending case. Thus, the critical facts here are not the close of discovery but the continued pendency of the litigation, the concomitant interest of the court in evidence which may bear on the case, the attorney's intent to avoid production, and the finality of the act of destruction.[2] Of course, the memoranda may never be requested and if requested it is possible that the court will not require their production. But so long as a case is pending, destroying a document which the lawyer knows is potential evidence removes the judge's ability to determine whether the potential evidence should be produced. Such displacement of the court's authority would prejudice the administration of justice, in violation of DR 1-102(A)(5). While a lawyer is, of course, bound to preserve confidences and secrets of a client and should zealously protect attorney work product, he or she may not unilaterally determine that a particular attorney memorandum to a client potentially discoverable in pending litigation should be destroyed in order to prevent production. The proper course is to preserve the document, while vigorously presenting the privileges as a defense to efforts to discover the document.

2. *Potential Cases*

The inquirer also asks whether the potential that future cases may be brought precludes discarding the memoranda. No disciplinary rule contains an explicit general prohibition against the destruction of documents potentially pertinent to future litigation. However, in some instances such destruction would violate the Code of Professional Responsibility.[3]

a. Conduct prejudicial to the administration of justice.

While DR 1-102(A)(5) is directed primarily toward pending litigation, some circumstances may be so close to pending litigation that the Rule would apply even though no pleadings have yet been filed with the Court. For example, if counsel has received notice from an aggrieved person's lawyer, stating that suit will be filed imminently, DR 1-102(A)(5) would bar the lawyer from destroying documents he or she knows are potential evidence in the anticipated litigation. There may be other instances when objective facts so strongly suggest that suit is imminent that intentional destruction of documents because they are potentially pertinent evidence would prejudice the administration of justice. The test in each instance is whether the document destruction is directed at concrete litigation, either pending or almost certain to be filed. The needs for certainty as to when the rule applies and for flexibility of action by the lawyer dictate that the rule application be thus confined. We therefo are not prepared to say that a mere belief that a matter is likely to be litigated is sufficient under DR 1-102(A)(5) to bar otherwise permissible destruction of attorney memoranda relating to the matter. The inquiry here does not provide sufficient information to allow us to determine whether DR 1-102(A)(5) would prohibit destroying the documents in the event the one presently pending suit were terminated.

b. Legal requirements.

Under DR 7-102(A)(3) a lawyer "shall not . . . conceal or knowingly fail to disclose that which he is required by law to reveal." See also DR 7-109(A) ("A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce"); EC 7-27; DR 7-102(A)(7) (a lawyer may not conceal or assist illegal conduct). Federal criminal law may forbid destruction of documents under certain circumstances.[4] It is also a crime in the District of Columbia for one who knows or has reason to believe an official proceeding has begun or who knows that an official proceeding is about to begin, to destroy a document with intent to

[1] We do not here address routine destruction of documents pursuant to an established records management program.

[2] Canon 9 ("avoid even the appearance of impropriety") buttresses this conclusion, although Canons are, under Opinions Nos. 82 and 101, not binding.

[3] Even if destruction is permissible, of course, the lawyer would retain in future litigation an obligation which DR 7-106(B)(1) may impose t call to the attention of the court adverse legal authorities cited in the memoranda.

[4] See, *e.g.*, 18 U.S.C. §401(3) (disobedience of lawful court order); 18 U.S.C. §1503 (obstruction of justice).

impair its availability for use in the proceeding. D.C. Code §22-723 (1981 ed.). Further, destruction of documents pertinent to pending litigation may run afoul of discovery rules having the force of law. Such rules could conceivably apply in some circumstances to future litigation as well. Thus, whether destruction of the memoranda in question would violate DR 7-102(A)(3) or (7) or DR 7-109(A) depends on the requirements of federal and D.C. law. There is a substantial body of case law under some of these statutes. However, since the Ethics Committee renders opinions only under the Code of Professional Responsibility, we offer no view as to whether destruction would violate these statutes. Rather, we note that DR 7-102(A)(3) requires that, in deciding whether to destroy the memoranda, the attorney should take reasonable steps to determine the legality of such destruction.[5]

c. Fraud.

DR 7-102(A)(7) forbids a lawyer to "counsel or assist his client in conduct that the lawyer knows to be...fraudulent." The Committee has previously interpreted "fraudulent" in DR 7-102(A)(7) in another context as "false or misleading" (Opinion No. 79), and it has elsewhere been noted that "'fraud' almost always means acts of affirmative misrepresentation rather than failure to disclose material facts." *Legal Ethics and the Destruction of Evidence*, 88 Yale L.J. 1665, 1667 (1979). Thus, it seems unlikely that destruction of memoranda which an attorney has prepared for a client would be considered fraudulent.

d. Prior district court ruling.

The question remains whether a trial court ruling that the attorney memoranda must be produced in one case creates an ethical obligation to preserve the memoranda because parties in future cases are likely to seek their production. DR 7-106(A) provides: "A lawyer shall not disregard or advise his client to disregard...a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling." The obligation imposed by the rule does not extend beyond the proceeding in which the ruling was made. While the term "proceeding" may in some circumstances encompass more than one case, the discovery order here probably does not apply to future cases. The discovery order in question here was mooted by the March 1981 settlement. It presumably does not purport to govern future cases. Therefore, unless some fact not before the Committee shows that future cases are part of the same "proceeding" as the case settled in 1981, DR 7-106(A) does not prohibit destruction of the attorney memoranda.

[5]Where the law is reasonably clear, the lawyer's own research suffices. If any doubt exists concerning the legality of such destruction, the prudent course is either to retain the materials or to consult outside counsel.

e. Prejudice to client.

Under DR 7-101(A)(3) "a lawyer shall not intentionally...prejudice or damage his client during the course of the professional relationship...." While the attorney here may properly consider prejudice which may result from disclosing the memoranda, such potential prejudice would not justify violating a disciplinary rule barring destruction of evidence. Furthermore, the attorney should also consider the potential impact on his client if potential evidence is destroyed. For example, if future litigation might raise the issue of the client's intent in following a course of conduct discussed in the attorney memoranda, destruction of the memoranda might well result in negative inferences regarding the client's intent. The attorney would have an obligation to advise the client to answer truthfully questions regarding the destruction and content of the document, if efforts to assert the attorney-client privilege fail in subsequent litigation as they did in the settled litigation. Thus, whether DR 7-101(A)(3) bars destruction depends on whether the attorney reasonably concludes that destruction of the memoranda will prejudice or damage his client. EC 7-3 suggests that the lawyer, in such a situation, "should give his professional opinion [to the client] as to what the ultimate decisions of the courts would likely be as to the applicable law."

f. Privilege.

This opinion does not depend on resolution of the question whether the memoranda are protected by the attorney-client privilege. Even if the memoranda constitute confidences or secrets of the client normally protected by DR 4-101(B) or the attorney-client privilege,[6] a court or the Disciplinary Rules may in some circumstances require their disclosure. Where disclosure is thus required, the exception to DR 4-101(B) allows disclosure.[7]

Inquiry 82-3-3
March 15, 1983

Opinion No. 120

DR 7-104—Communicating with adverse party

Synopsis

Counsel for plaintiff in an automobile negligence case violates DR 7-104(A)(1) by sending a copy of his letter containing a prediction for the case and settlement offer directly to defendant who is represented by counsel.

[6]DR 4-101(B) provides in relevant part: "Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of his client...."

[7]DR 4-101(C) provides in relevant part: "A lawyer may reveal: ....(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

Facts

Inquirer represents an insurance carrier and, pursuant to that relationship, represents a defendant in an automobile negligence case. Plaintiff in the negligence case claims damages in excess of the defendant's policy limit. Counsel for plaintiff wrote inquirer expressing the views that plaintiff would prevail on liability and that the verdict amount would exceed the policy limit, thereby rendering defendant personally liable for the difference. The letter contained an offer to settle for the policy limit.

The ethical question in this case arises because plaintiff's counsel sent a copy of the letter directly to defendant, in addition to addressing it to defense counsel. The Committee believes that this violates DR 7-104 (A)(1).

Discussion

DR 7-104 is entitled "Communicating with One of Adverse Interest." Subsection (A)(1) provides:

> During the course of his representation of a client a lawyer shall not:
>
> Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The Committee's view is that sending the defendant a copy of the litigation analysis/settlement letter violates the plain wording of DR 7-104(A)(1). The letter is a communication; the defendant is a party known to plaintiff's counsel to be represented by a lawyer;[1] and both the litigation forecast and the settlement offer are squarely on the subject of the representation.

This view is confirmed by relevant opinions of the ABA Committee on Ethics and Professional Responsibility. In Informal Opinion 1348, the Committee found that DR 7-104(A)(1) would be violated in the context of civil litigation if an attorney sent a copy of his settlement proposal to opposing counsel's client, even though the sending attorney believed that opposing counsel would not himself transmit the offer to the client.

In Informal Opinion 1373, the Committee (on request of the Office of United States Attorney and a judge of the Superior Court of the District of Columbia) found that it was improper under DR 7-104(A)(1) for the government to send the defendant a copy of a letter it sent to defense counsel offering a disposition by plea.

[1]It is irrelevant that inquirer's services to defendant were arranged for and paid for by the insurer. Defendant is represented by inquirer and the attorney/client relationship exists between them. *E.g., Lieberman* v. *Employers Insurance of Wausau*, 419 A.2d 417 (N.J. 1980). *See also*, DR 5-107(A)(1) (a lawyer may accept compensation for his legal services from one other than the client with the consent of the client after full disclosure).

Informal Opinion 1362 was rendered in the context of a challenge to the by-laws and governing rules of a professional association of which plaintiff was a member. Plaintiff's counsel sought to communicate to various elected and appointed officials of the association the rightness of plaintiff's position on the merits, together with her "settlement requirements." The Committee advised that these communications "would clearly be communications within the ambit of DR 7-104(A)(1)" and could not ethically be made without the consent of defendant's counsel.

The prohibition of DR 7-104(A)(1) on communication with a represented adverse party contains two exceptions. The first is when opposing counsel consents in advance of the communication; the second is when the communication is authorized by law. Neither exception applies here; opposing counsel (inquirer) objects to the communication, and the Committee is unaware of any statute or procedural rule or rule of law which would authorize the communication.[2]

Inquirer was of course obligated to communicate the offer of settlement to the defendant (and the inquiry received by this Committee demonstrates inquirer's awareness of that obligation). Plaintiff's counsel could have reminded inquirer of this obligation in transmitting the settlement offer to inquirer. ABA Informal Opinion 1362. But, based on the wording of DR 7-104(A)(1), the interpretive opinions of the ABA, and the non-applicability of the exceptions, the Committee believes that plaintiff's counsel acted improperly in forwarding a copy of his letter to inquirer's client.

Inquiry No. 82-12-21
March 15, 1983

Opinion No. 121

DR 2-101(A); DR 2-101(B)(5)—Description of Legal Fees in Advertising

Synopsis

A law firm's advertisement stating "Reduced Fees Available," unaccompanied by a description of what such fees were or are, violates DR 2-101(A) because it does not conform to the types of advertising of legal fees permitted by DR 2-101(B)(5).

The Inquiry

The inquirer has asked whether an advertisement for legal services which contains the bold-faced statement "REDUCED FEES AVAILABLE" unaccompanied by any other description of what the advertiser's legal fees were or are violates Disciplinary Rules 2-101(A) and 2-101(B)(5).

Discussion

DR 2-101(A) provides in relevant part:

> A lawyer shall not knowingly make any representation about . . . the fee or any other aspect of a proposed professional engagement that is false, fraudulent, misleading, or deceptive, and that might reasonably be expected to induce reliance by a member of the public.

Then, speaking as to fees specifically, DR 2-101(B)(5) provides:

> Without limitation, a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:
>
> ***
>
> Relates to legal fees other than:
>
> (a) A statement of the fee for an initial consultation;
> (b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;
> (c) A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;
> (d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter;
> (e) The availability of credit arrangements; and
> (f) A statement of the fees charged by a qualified legal assistance organization in which he or she participates for specific legal services the description of which would not be misunderstood or be deceptive; . . . .

Disciplinary Rules 2-101(A) and (B) were adopted by the District of Columbia Court of Appeals on July 12, 1978, and differ from the provisions of the American Bar Association Code of Professional Responsibility relating to advertisement of legal fees.

The Committee has construed DR 2-101 (B)(5) on a number of previous occasions. For example, in our Opinion No. 53 we concluded that an advertisement stating "Attorneys Fees from $150: Other Legal Services at Comparable Rates" violated the Rule. In reaching that conclusion we made clear that if an advertisement concerning legal fees does not fall within one or more of the specific categories listed in DR 2-101 (B)(5) it violates DR 2-101(A):

> DR 2-101(B)(5)(c) does permit a 'statement of the range of fees for specifically described legal services.' However, the term 'range of fees' connotes an upper limit as well as a lower one. No upper limit is stated in the advertisement in question. Moreover, even in connection with a 'range,' the rule requires 'a reasonable disclosure of all relevant variables and consideration so that the statement would not be misunderstood or be deceptive.' There is nothing in this ad that could be construed to be such a statement.
>
> The ad also states: 'Other Legal Services at Comparable Rates.' This likewise is a statement that relates to legal fees other than one of the statements specifically listed and described in DR 2-101(B)(5)(c). Hence, it is prohibited.

In Opinion 81 we considered an advertisement that represented that the rates to be charged by the advertising attorneys were "reasonable and affordable," unaccompanied by any statement of what those rates actually were. Again, we concluded that the advertisement in question violated DRs 2-101(A) and 2-101(B)(5):

> DR 2-101(B) permits *no* statements regarding fees except those *specifically* permitted by DR 2-101(B)(5)(a)-(f). . . . A statement that fees are 'reasonable' or 'affordable' is not permitted by any of the subparts of the disciplinary rule. Such a statement does not inform a prospective client of the fee for an initial consultation, or of the fee for a specific legal service; not does it state a range of fees or specific hourly rates. Thus, the statements made with respect to fees fall outside the specific limits established by DR 2-101(B)(5), rendering them a violation *per se* of DR 2-101 (A). (Emphasis in original.)

Most recently, in Opinion 91 we considered a letter purporting to describe a prepaid legal services plan in which it was stated that the offeror of the plan would "handle trial matters at three-fourths my normal fee for a total cost to you of $250.00 per year." The sample retainer agreement attached to the letter revealed that there were several important exceptions to the general statement made in the letter. After a discussion of those discrepancies, we went on to say:

> DR 2-101(B)(5) further defines a fraudulent or misleading statement to include 'any statement or claim that relates to legal fees other than' those provided in six limited exceptions. The inquirer's mention in his letter of a $250.00 annual fee does not fall within any of those exceptions and is thus prohibited by the Code as *per se* misleading.

As we stated in our recent Opinion 117, which related to advertisements concerning the "quality" of legal services, we are "acutely aware that any rule that seeks to regulate speech encroaches on a constitutionally protected field." We also recognize that in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), decided prior to the Court of Appeals' adoption of the Rules at issue the Supreme Court held that advertisemen of legal fees is included among those forms of speech protected. Indeed, in a footnote to Opinion 53, some members of the Committee expressed the concern that DR 2-101(A)

[2] *Cf.* ABA Informal Opinion 985 (offer of judgment served on opposing counsel; DR 7-104 not violated because state statute provided that offer of judgment may be served "upon the plaintiff or his attorney"). In both the federal and the District of Columbia courts, Civil Rule 68 authorizes an offer of judgment to be served upon the "adverse party." However, that provision is modified by Civil Rule 5(b) which provides "whenever under this Rule service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court." Moreover, the letter under consideration here does not appear to be a Rule 68 offer of judgment.

and DR 2-101(B)(5), if applied literally, may violate the First Amendment. Nevertheless, the *Bates* decision itself held only that an absolute ban on fee advertising was impermissible, and the Court in that case affirmatively acknowledged that a state may impose "reasonable restrictions on the time, place, and manner of advertising," and, indeed, that "because the public lacks sophistication concerning legal services," types of misstatements that "might be overlooked or deemed unimportant in other advertising may be found inappropriate in legal advertising," and some types of advertising claims "may be so likely to be misleading as to warrant restriction." *Id.* at 383-84.[1]

Since the Court of Appeals has made a determination that fee advertising not falling into the categories listed in DR 2-101(B)(5) is among those types of advertising so likely to be misleading as to warrant prohibition, and we are aware of no court decision holding that determination "unreasonable," we, therefore, see our job to interpret Rules 2-101(A) and (B) as we find them. In undertaking that task, it appears clear to us that the statement "reduced fees available" appearing in an advertisement for legal services unaccompanied by any description of what those fees were or are, does not fall within any of the categories of advertising as to legal fees permitted by DR 2-101(B)(5). Thus, the advertisement is conclusively presumed to be misleading or deceptive and thereby violates DR 2-101(A).

Inquiry No. 83-1-1
Adopted March 15, 1983

Opinion No. 122

DR 2-108(A); DR 2-107(A); EC 2-22—Partnership Agreement Prohibiting Performance of Legal Services for Firm Clients Following Departure From Firm; Memorandum Agreement Requiring Departing Partner to Pay to Firm Percentage of Fees Earned From Representation of Specific Clients

Synopsis

A partnership agreement which absolutely prohibits a departing attorney from representation of firm clients for a certain duration violates DR 2-108(A). A memorandum agreement, which requires a departing attorney to share a percentage of his fees from specific clients with his former firm, violates DR 2-108(A) and DR 2-107(A)(2).

Facts

The inquirer asks the Committee whether a law firm may (1) execute a partnership agreement which prohibits a partner, upon departure from the firm, from performing services for clients of the firm for a period of eighteen months, and (2) execute a memorandum agreement which requires the departing attorney to pay the firm a percentage of fees earned for a period of five years from specific clients.

The inquirer, a District of Columbia law firm, represents a member of the bar who has entered a Partnership Agreement and a related Memorandum Agreement with a local law firm. The Partnership Agreement, which generally limits the right of a departing partner to represent a firm clients, provides:

> In the event any partner shall for any reason depart or otherwise sever his connection with the firm of [Partnership], he agrees that he will not for a period of eighteen (18) months thereafter either directly or indirectly perform services for any Partners Account(s)' of any of [Named Partners].

The Memorandum Agreement, which permits the departing lawyer to represent a specific client, but provides for fee sharing by the firm, states:

> [Client] has been referred to [Partnership] through contacts with [Names Partners].
>
> [Client] shall be considered the client of [Departing Member], and the account of [Client] shall be handled in accord with the following provisions and conditions:
>
> For a period of five years from the effective date of this agreement, [Named Partners] shall receive twenty percent (20%) of the difference between the gross billings paid by or for the account of [Client] and provable disbursements.

The inquirer's client has decided to terminate his relationship with the local firm and to start his own firm. The inquirer asks the Committee whether the partnership and memorandum agreements are ethically proper.

Discussion

I. *The Partnership Agreement*

At the outset we note that this Committee has several times considered the issue of restrictive covenants in employment agreements entered into by law firm associates.[1] We believe that the same ethical considerations which govern employment contracts are applicable to restrictive covenants contained in partnership agreements.[2] DR 2-108 (A) provides:

> A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

This Committee has generally recognized the valid business interest of a law firm in protecting its client base. In its Opinion No. 97, the Committee considered the propriety of an employment agreement which provided, *inter alia*, that a departing associate would "refrain from contacting clients of the firm for the purposes of retaining such clients for his own services." The firm in that inquiry had, however, permitted the departing associate to mail announcements of his departure to firm clients. In approving the agreement, the Committee stated that restrictions on post-employment client solicitation were permissible under DR 2-108, *provided*, that the right to send announcements was preserved. Similarly, in Opinion No. 77 the Committee approved an employment agreement that required payment of liquidated damages if the departing lawyer solicited his former firm's clients *other than* by general announcement.[3] In both Opinions No. 97 and No. 77, however, the Committee specifically relied upon the fact that absent some violation of the agreements in question, the lawyers could be retained by their former firms' clients.

In contrast, however, the partnership agreement in the present inquiry provides no grounds upon which the departing lawyer might be employed by clients of other partners in his former firm. There is an absolute eighteen month prohibition on such representation. Even if a client became dissatisfied with the performance of the firm and unilaterally sought out the departing lawyer for assistance, the Partnership Agreement would preclude the attorney from accepting the assignment. Notwithstanding the business interest of a law firm in retaining its clientele, this prohibition is inconsistent with the practice of law as a profession, and directly interferes with clients' choice of an attorney.[4]

In finding that the Partnership Agreement violates DR 2-108(A), the Committee does not believe that creation of a memorandum agreement, which permits representation of one of the former firm's clients, mitigates the impropriety of the Partnership Agreement. Nor indeed, does the limited eighteen month duration of the Partnership Agreement affect our finding of impropriety. Freedom in representation of lawyers,

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[1] *Accord*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 (1978) (permitting prohibition of in-person solicitation by lawyers); Friedman v. Rogers, 440 U.S. 1 (1979) (prohibition of trade names by optometrists). *Cf.*, In re Matter of R.M.J., ___U.S.___, 102 S. Ct. 929 (1982) (disbarment for mailing advertising cards to the public, listing courts where admitted to practice and describing areas of specialization in terms other than those prescribed in state bar rules reversed because the prohibitions enforced were "more extensive than reasonably necessary to further substantial interests").

[1] *See* Opinions Nos. 65, 77, and 97.

[2] ABA Comm. on Ethics and Professional Responsibility, Informal Op. No. 1072 (1968).

[3] DR 2-102(A)(2) permits announcement of new or changed associations, subject to certain limitations.

[4] *See* Opinion No. 65; *see also* ABA Comm. on Ethics and Professional Responsibility, Informal Op. No. 1171 (1971) (partnership agreement prohibiting departing lawyer from providing any services to former firm's clients during two-year period following departure violated DR 2-108(A)).

and choice of representation by clients, is explicitly guaranteed by DR 2-108(A).

II. *The Memorandum Agreement*

The Memorandum Agreement in this inquiry is most analogous to the employment agreement considered by this Committee in its Opinion No. 65. That agreement required an associate representing his former firm's clients to pay forty percent of his new billings to the firm for two years after his departure. The Committee first found that the contract violated DR 2-108(A) since, although it did not prohibit a professional relationship between the lawyer and his former firm's clients, it was "nonetheless a restriction on the right to practice law after the termination of the relationship created by the employment agreement." Second, the Committee found that the contract violated DR 2-107(A)[5] since there was no provision for assuring a division of fees with the firm in proportion to services performed and responsibility assumed.

The Memorandum Agreement in the present inquiry is narrower than the employment agreement considered in Opinion No. 65 since it narrowly applies to one client. Nevertheless, we believe that a finding of violation of DR 2-108(A) and DR 2-107(A) is similarly warranted.

First, the requirement of payment of fees to the former firm, without regard to the circumstances leading to the creation of the attorney-client relationship, would provide an economic disincentive to represent this client. Unlike the liquidated damages provision considered in Opinion No. 77, it would be impossible for the lawyer to represent the client and yet avoid sharing fees with the former firm. The likelihood of interference with the representation of this client mandates a finding of violation of DR 2-108.

Second, even if the client consents to the Memorandum Agreement's fee sharing arrangement, the disproportionate payment of fees without regard to work performed by the firm would violate DR 2-107(A)(2). Under the Agreement, there would be an incentive for the lawyer to charge a larger fee to the client as a means of recouping payments made to the firm for work which he, and not the firm, had performed.[6]

In summary, for the reasons stated above, the Committee finds that the Partnership Agreement and Memorandum Agreement in this inquiry are ethically proscribed. Therefore, it is improper for a firm to require a member or associate to sign such a provision, and improper for an attorney to agree to such a provision.[7]

Inquiry No. 81-7-20
March 22, 1983

Opinion No. 123

DR 2-102(B), Canon 2—The name of a deceased patent attorney may appear on the letterhead of a law firm, so long as the fact that he was not a member of the bar clearly appears thereon.

Synopsis

In our Opinion 38 (July 19, 1977), we decided that a law firm may include on its letterhead the name of a patent agent who was a full-time employee of the firm, a law school graduate with a Bachelor of Laws degree, but not a member of the bar of any jurisdiction. We address, in this opinion, the question whether the name of a deceased patent attorney may appear on the letterhead of the firm he helped to find. Consistent with Opinion 38, we conclude that it may.

Facts

The inquiring attorney wishes to know whether the name of a deceased patent attorney, along with the word "founder" after his name, may appear on the letterhead of a law firm. The deceased individual was the founder of a predecessor of the firm, and was well known to its past and present clients with whom he established significant goodwill. He was a registered patent attorney but not a lawyer, and, therefore, limited his activities to practice before the United States Patent and Trademark Office. For approximately ten years prior to his death, the individual was associated with the firm and its predecessor as a consultant.

Discussion

Opinion No. 38 stands for the proposition that a patent agent's name may appear on the letterhead of a law firm so long as the name of the agent is set apart from the lawyers of the firm and is followed by the legend "Patent Agent." The Opinion notes that because the term "Patent Agent" does not imply that the agent is a member of the bar and engaged in the practice of law, such as listing is not misleading and does not violate any of the disciplinary rules under Canon 2 or Canon 3.

DR 2-102(B) states that:

> A lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B), or is contrary to law . . . [I]f otherwise lawful a law firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

The clear import of DR 2-102 is that lawyers should not practice under names which mislead the public in any way, including whether members of the firm are licensed to practice law in one or more jurisdictions. Reference to a deceased firm member is not misleading if the law firm's name or letterhead indicates that the individual is no longer associated with the firm. Similarly, there is no impropriety in listing a patent attorney on the firm's letterhead so long as the letterhead does not imply that the individual is entitled to practice law. Taking these two principles together, it is the Committee's opinion that a law firm's letterhead may bear the name of a deceased patent attorney so long as the material fact that the deceased individual practiced only before the Patent and Trademark Office is made clear. For this reason, the words "Patent Agent" should appear beside the individual's name or the designation "founder."

Inquiry No. 81-7-19
March 22, 1983

Opinion No. 124

Canon 4, DR 4-101—Disclosure of Client Identities to IRS Auditors

Synopsis

We have been asked whether an attorney ethically may disclose to an IRS auditor the names of clients represented by the attorney's firm. Under the facts presented, where the clients appear to desire continued confidentiality, DR 4-101 prohibits voluntary disclosure by the firm of the clients' identities without the clients' consent, because such disclosure would likely reveal "confidences" or "secrets" of those clients. However, DR 4-101 does not prohibit the inquiring attorney's firm from complying with a court order to disclose client identities, provided that the firm takes appropriate precautions to ensure that the clients' interests in nondisclosure are adequately presented to the court.

Facts

The inquirer is an attorney whose firm is currently undergoing a routine Internal Revenue Service audit of its 1980 income tax

[5] DR 2-107(A) provides:

> A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
> (2) The division is made in proportion to the services performed and responsibility assumed by each.
> (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered to the client.

[6] *See* DR 2-107(A)(3). This finding is particularly justified in light of the reasonable fee policies expressed in Ethical Consideration 2-22.

[7] The Committee's opinion extends only to issues arising under the Code of Professional Responsibility as promulgated in the District of Columbia. The Committee expresses no view concerning any legal rights which may be created by the agreements in question.

returns. The firm has provided to the auditor records of the firm's receipts with client names deleted. However, in accordance with IRS guidelines, the auditor has requested disclosure of the names of the firm's clients, in order to determine whether any of those clients are political action organizations or politicians.

The inquirer's firm has, during the pertinent time period, represented members of Congress under circumstances in which disclosure of that fact could damage the political careers of its congressional clients. In almost all instances, the firm's representation of those clients never became a matter of public record. Accordingly, the inquirer asks what ethical obligations govern the firm's response to the auditor's request for disclosure of its clients' identities.

Specifically, the inquirer asks three questions:

(1) Are there any ethical obligations generally relating to the firm's voluntary disclosure of client names to the IRS appurtenant to an audit of the firm's income tax returns;
(2) Is the firm constrained or prohibited by any such ethical obligations from disclosing the firm's representation of public figures, particularly members of Congress; and
(3) What are the firm's ethical obligations with respect to compliance with a subpoena *duces tecum* if the IRS should issue one in an effort to learn the identities of the firm's clients?

Discussion

Disclosure of information obtained in the course of representing a client is governed by Canon 4, which requires a lawyer to preserve the confidences and secrets of a client. Ethical Consideration 4-1 identifies the purpose of this requirement to be the facilitation of full and frank discussions between the lawyer and the client. If the client knows that his or her confidences and secrets will be preserved by the lawyer, the client presumably will not withhold important information from the lawyer, and the quality of the lawyer's representation will, thereby, be improved.

Client "confidences" and "secrets" are defined by DR 4-101(A), which states:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Although the terms "confidence" and "secret" customarily apply to information received from clients, there is no reason to conclude that they cannot also apply to the mere fact that a client is being represented by an attorney. DR 7-106(B)(2) suggests that client identities may constitute "confidences." Whether or not the mere fact of representation can constitute a "confidence," however, if a client has requested that the fact of representation not be disclosed, or if such disclosure would embarrass or detrimentally affect the client, the fact of representation would itself fall within the definition of a "secret." Indeed, in Opinion No. 58, we strongly implied that the mere fact of representation, without more, could constitute a client "confidence" or "secret." *See also* ABA Informal Opinion No. 1287 (1974), which found the identities of legal service clients to be "secrets" within the meaning of DR 4-101 (A). Moreover, even if the fact of representation were known by someone other than the attorney or the client, thereby destroying the confidentiality necessary to the attorney-client privilege, the fact of representation could still constitute a "secret" if the avoidance of additional disclosure was, nevertheless, desirable.

Under the facts of the present inquiry, it appears that at least some of the firm's clients have either requested that the fact of their representation by the firm not be disclosed, or have retained the firm under circumstances in which such disclosure would adversely affect their interests. Although the inquiry suggests that some of the firm's congressional clients fall into this category, the definitions of "confidences" and "secrets" can encompass any of the firm's clients, whether they are public figures or not. Therefore, whenever a client requests nondisclosure of the fact of representation, or circumstances suggest that such disclosure would embarrass or detrimentally affect any client, the fact of the firm's representation of that client is a client "confidence" or "secret" subject to the protections accorded by the other provisions of Canon 4.

The remaining provisions of Canon 4 contain a general prohibition on the disclosure of client confidences or secrets, subject to certain exceptions. DR 4-101(B) and (C) state in pertinent part:

> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
>
> ****
>
> (C) A lawyer may reveal:
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order. [Footnotes omitted]
>
> ****

Unless one of the enumerated exceptions applies, DR 4-101(B) prohibits the inquirer's firm from disclosing the identities of its clients to the IRS auditor where such disclosure could be contrary to the interests or the expressed desires of the clients. Moreover, the prohibition applies to the firm's former clients, as well as to its present clients. *See* EC 4-6; Opinions No. 99, 96, 83 n.2, 58 and 14.

Two exceptions to the prohibition on disclosure are potentially applicable.[1] The first, contained in DR 4-101(C)(1), permits disclosure after obtaining the consent of the affected clients. As we have previously indicated, such consent must be informed consent, given after the lawyer fully explains to the client the potential consequences of disclosure. *See* Opinions No. 99 and 72. Accordingly, the inquirer's firm may seek the informed consent of its affected clients to disclosure if the firm desires to do so, and may disclose the identities of those clients from whom such consent is obtained. However, because the exception enumerated in DR 4-101(C)(1) is permissive, rather than mandatory, the firm is not under any ethical obligation to seek the consent of its clients to disclosure.[2]

The second potentially applicable exception is contained in DR 4-101(C)(2), which permits disclosure of client "confidences" or "secrets" when required by law or court order. Accordingly, the IRS may issue a summons for any information contained in the firm's files if it genuinely desires access to such information. However, even if the IRS does issue a summons, the inquirer's firm may not automatically comply with it. Rather, the firm remains under an ethical obligation to resist disclosure until either the consent of the clients is obtained or the firm has exhausted available avenues of appeal with respect to the summons.[3]

We have frequently considered the ethical obligations imposed upon an attorney against whom a proceeding to compel disclosure of client "confidences" or "secrets" is commenced, and have concluded that the

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[1]Ethical Consideration 4-3 permits limited disclosure of information obtained from clients to outside agencies, such as bookkeepers and accountants, that provide services to the firm. However, this provision does not authorize disclosure to the IRS auditor under the facts presented, where the IRS is not acting as an agent of the firm. *See* Opinion No. 72, where we found that EC 4-3 was not intended to authorize disclosure to outside auditors.

[2]Any interest that the IRS has in determining whether the firm's clients would consent to disclosure can be protected in an action to enforce an IRS summons as is discussed below.

[3]The IRS is authorized to seek judicial enforcement of its summonses when taxpayers do not voluntarily comply with IRS disclosure requests. *See* 26 U.S.C. § 7602 *et seq.* The inquirer's firm can raise its objections to disclosure during such enforcement proceedings, as well as during any preliminary administrative proceedings that might be available. Once a judicial order compelling disclosure is obtained, however, DR 7-102(A)(3) appears to require the firm to comply with that court order. To the extent that the IRS may be authorized to deny summarily a taxpayer's claim where the taxpayer does not voluntarily comply with an IRS summons, or to take other actions that adversely affect the taxpayer, the firm may protect its interests by either obtaining the consent of its affected clients to disclosure or by itself seeking a judicial order denying the IRS access to the identities of its clients.

attorney owes an obligation to the client to resist disclosure. *See* Opinions No. 99, 83 and 14. If such a proceeding is commenced, the attorney is subject to two basic ethical obligations. First, the attorney must notify the affected clients of the pendency of the proceeding, so that the clients can take whatever steps they deem appropriate to protect their interests in nondisclosure. Second, unless the clients relieve the attorney from further obligations, the attorney must assert in the pending proceeding the clients' interests in nondisclosure. These ethical obligations are discussed in greater detail in Opinion No. 14. Moreover, as that opinion emphasizes, in making any of the determinations required under Canon 4, such as whether disclosure would adversely affect a client's interests, all doubts should be resolved in favor of the client.

Under the facts presented, if the IRS should issue a summons for records revealing client identities, the inquirer's firm should notify those affected clients who might possibly object to disclosure and, in the absence of contrary instructions, should resist disclosure on behalf of those clients. If, after adequately asserting the clients' interests in nondisclosure and exhausting available appeals, the inquirer's firm is, nevertheless, ordered by a court to reveal the identities of its clients, the firm ethically must comply with the court order.

Conclusion

In light of the foregoing discussion, we answer the specific questions posed by the inquirer as follows:

(1) DR 4-101 prohibits voluntary disclosure to IRS auditors of the identities of a firm's clients where the clients have requested nondisclosure or where disclosure might adversely affect the interests of the clients;
(2) Where the clients object or might object to disclosure of their identities, the firm is ethically prohibited from voluntarily making such disclosure without the informed consent of the clients, whether or not the clients are public figures; and
(3) If confronted with an IRS summons, the firm should notify affected clients of the issuance of the summons and, in the absence of contrary instructions, should resist disclosure on behalf of its clients.

Inquiry No. 82-5-7
March 22, 1983

Opinion No. 125

DR 5-101(B), DR 5-102(A)—Attorney Representing Another Attorney in Same Firm in Litigation Arising Out of Private Contractual Dispute Where Attorney Involved in Dispute Will be Trial Witness

Synposis

An attorney (Attorney A) engaged in practice in a firm with two other attorneys (Attorneys B and C) seeks to represent B and C in a contractual dispute between B and C and another person who has brought suit against B and C. B and C will be witnesses at trial. A question has arisen concerning the propriety of representation by A. Although the representation may appear to be a violation of the literal language of DR 5-101(B) or 5-102(A), it does not appear that these disciplinary rules were intended to prohibit such representation. Such a representation appears to present no dangers to the proper functioning of the adversary system, and no significant risk of harming the profession in the eyes of the public. To preclude representation would unreasonably interfere with the choice of counsel by B and C.

Facts

Two attorneys who practice in a firm entered into a construction contract with another person. A dispute ensued, and the other person brought suit against the two attorneys (B and C), who asked another attorney in their firm (A) to represent them. It appears virtually certain that B or C or both will be necessary witnesses in any trial. Attorney A, and the firm itself, had no prior professional involvement in the construction contract or the controversy; their role began after the litigation commenced.

Counsel for the party opposing B and C has sought the disqualification of A on the grounds that A's representation would be in violation of DR 5-101(B). Although the Committee normally does not render opinions on matters in litigation, it has exercised its discretion under its Rules to do so in this case because it was asked for an advisory opinion on the facts presented by the presiding trial judge.

Discussion

DR 5-101(B) contains prohibitions relating to representations where a lawyer in the firm ought to be called as a witness in litigation. It provides:

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
> (1) If the testimony will relate solely to an uncontested matter.
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Similarly, DR 5-102(A) requires an attorney to withdraw if, after undertaking a representation, it is obvious that another attorney in the firm ought to be called as a witness. DR 5-102(A) is subject to the same exceptions as set forth with respect to DR 5-101(B); none of these exceptions is claimed by A to be applicable in this instance.

It seems clear that a literal reading of DR 5-101(B) and DR 5-102(A) would preclude continuation of the representation by A under the facts described above. The provisions are unequivocal, and none of the exceptions can reasonably be found applicable. If the inquiry were to halt at this point, the Committee would be compelled to conclude that the representation cannot properly be continued.

The Committee has already found, in a somewhat similar situation, that so literal an application of the disciplinary rules cannot be justified. In Opinion 44, we concluded that it was not improper for a law firm to represent its own interests in litigation, although members of the firm would doubtless appear as witnesses. That situation, however, involved the firm's representation of the firm's interests, rather than representation of an attorney in the firm with respect to that attorney's private interests. Opinion 44, therefore, is not, without further analysis, dispositive of the inquiry presented here

Obviously, it is not the role of the Committee to disregard conscious choices reflected in the language of the disciplinary rules. If the rules, as adopted by the District of Columbia Court of Appeals, reflect judgments which the Committee views as undesirable as applied to particular factual situations, our role is to propose appropriate amendments to the Code of Professional Responsibility pursuant to the rules of the Committee. That course is one which we followed, for example, in the wake of Opinion 80, where we felt compelled to interpret DR 7-104 as applying to communications with government officials. The Committee so interpreted the Code, but initiated procedures for proposing amendments to DR 7-104.

Here, unlike the situation confronting us in Opinion 80, we conclude that the factual circumstances presented in the inquiry were not specifically addressed by those who drafted the Code, or by the Court in adopting DRs 5-101 and 5-102. In such circumstances, we consider it appropriate to examine, as best we can, the concerns which underlie the surface language, to determine whether those concerns are implicated in the situation presented to us.

Several rationales underlie the rule that a lawyer may not act both as advocate and witness. The lawyer may be more easily impeachable for interest, and hence less effective as a witness; opposing counsel, it is sometimes said, may be handicapped in challenging the credibility of the lawyer/witness; and such a lawyer/witness will be in the

unseemly position of arguing his or her own credibility. *See* 6 *Wigmore on Evidence* § 1911 (1940 ed.). These considerations, however well-taken, have no application here, for there is no suggestion that either B or C will appear in any role other than that of witness.

It is difficult to see what harm to the adversary process, or to the image of lawyers in the public mind, would result if an attorney in a law firm is permitted to represent other attorneys in that firm. How, for example, is this different from representing one's spouse, or a close friend? Obviously, there may be some diminished objectivity when an attorney represents a family member or close friend, but such a relationship, without more, is not sufficient basis for precluding representation. If the case is ultimately tried by jury, there would appear to be no reason for the professional relationship of the advocate (Attorney A) to B and C to be the subject of discussion before the jury. And, if trial be to the court, there seems to be no sound basis upon which the Committee could conclude that the judge would find knowledge of the relationship an unruly event impairing his ability to administer justice. Indeed, at a practical and nontechnical level, it seems quite natural for attorneys in a firm, finding themselves in litigation in no way connected with their professional relationship, to call upon their professional colleagues to serve as their counsel.

A virtually identical situation was presented in *Bottaro* v. *Hatton Associates*, 680 F.2d 895 (2d Cir. 1982). In *Bottaro*, an attorney who was a member of a law firm was the plaintiff in litigation, and his firm represented him. Defendants sought the disqualification of the firm, and were successful in the District Court. The trial judge had found the interest of the plaintiff in choosing his own counsel outweighed by the need to protect the integrity of the bar, an integrity compromised because plaintiff's counsel would be arguing the credibility of a member of the firm. 680 F.2d at 896.

Although, on appeal, defendants conceded the right of the firm member to be represented by his firm (while continuing to seek the disqualification of the firm as a representative of other plaintiffs), the Court of Appeals nonetheless commented upon the propriety of the firm representing its plaintiff/member, saying:

> Members of the bar have, like all litigants, a right to select their own counsel. While this right may not be absolute, it can be overridden only where compelling reasons exist.
>
> The plain implication of *Flanzer [International Electronics Corp.* v. *Flanzer*, 527 F.2d 1288 (2d Cir. 1975)] is that a lawyer-litigant witness...may select a law partner as trial counsel.

680 F.2d at 897.

The Court addressed the purposes underlying DR 5-102, finding the purposes of the disciplinary rule "not implicated when a lawyer is a litigant as well as a witness, but not an advocate, even though a member of his or her firm is trial counsel. The role of the lawyer-litigant-witness is confined to testifying and his or her interest in the outcome of the litigation is clear to the trier of fact." *Id.*

The Committee embraces the rationale of *Bottaro* and *Flanzer*. While we recognize that a Court may refuse to order disqualification of counsel, even where there is a violation of a disciplinary rule, where the integrity of the adversary process is not impaired (*see, e.g., Board of Education* v. *Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979), we view *Bottaro* as reflecting a sound interpretation of DR 5-102(A) and, inferentially DR 5-101(B) as well. Accordingly, the Committee concludes that, in the circumstances presented, attorney A may be represented in litigation by other attorneys in his firm, where attorney A, who is a party to the litigation, will not be appearing as an advocate in the proceeding.

We emphasize that this opinion is strictly limited to the specific facts presented in the inquiry. The Committee expresses no opinion as to the conclusion it would reach in other circumstances, where one or more of the elements presented in the inquiry differ. In particular, the Committee cautions that lawyers should not assume that any other factual circumstances, apart from those set forth here and in our Opinion 44, would be viewed as justifying an exception to the literal language of DRs 5-101(B) and 5-102(A).

Inquiry No. 81-12-34
April 26, 1983

Opinion No. 126

EC 2-19, EC 2-23, DR 4-101, DR 5-101(A), DR 5-102(B), DR 7-102(B)(1)—Court-Appointed Attorney's Responsibilities When Client Fails To Comply With Court Order To Pay A Portion Of The Cost Of Representation

Synopsis

An attorney appointed to represent a partially indigent defendant in a criminal case may not reveal the client's failure to comply with a court order to reimburse the court for part of the attorney's fees unless the attorney is required by the court to make this disclosure. The attorney may disclose a client's violation of a court order to pay directly to the attorney part of the attorney's fees in the case if such disclosure is necessary to collect the fee and if action to collect the fee is otherwise proper. If contempt or other proceedings are brought against the client for the alleged failure to comply with the contribution order, the attorney must seek leave to withdraw from the case if the attorney's representation of the client is affected by his or her own interest in receiving the previously ordered contribution from the client.

The Inquiry

Defendants in most criminal cases are entitled under the Sixth Amendment to be represented by counsel. If a defendant is financially unable to retain his or her own counsel, the court is constitutionally required in such cases to provide the defendant with an attorney. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Argersinger* v. *Hamblin*, 407 U.S. 25 (1972). In the Superior Court of the District of Columbia this constitutional mandate is implemented through the District of Columbia Criminal Justice Act, District of Columbia Code § 11-2601 *et seq.* The Act is similar to the Federal Criminal Justice Act, 18 U.S.C. 3006A, and is administered in accordance with the *Plan for Furnishing Representation to Indigents Under the District of Columbia Criminal Justice Act*, which the Joint Committee on Judicial Administration adopted in 1974 as required by the first section of the Act, and also in accordance with the *Standards of Eligibility Under the Criminal Justice Act* which the Superior Court adopted in 1971 and revised effective May 1, 1983. The Act recognizes that some defendants who are not able to afford the entire cost of legal representation in a criminal case nevertheless have some funds available for this purpose. Accordingly, Section 11-2606(a) of the Act provides:

> Whenever the Court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney...or to the Court....

See also Paragraph III.D. of the *Plan*. Paragraph 9 of the *Standards of Eligibility* provides further guidelines for this situation, and it is from some language in this provision that these orders have come to be known as "contribution orders."

The inquiring attorney has raised two basic questions deriving from the entry of contribution orders. The first concerns the obligations of the attorney when he or she learns that the client has failed to comply with the contribution order. This situation could arise regardless of whether the client has been ordered to pay the contribution to the individual attorney or to the Court. The second question involves the attorney's responsibilities when the alleged failure of the client to comply with the contribution order has come to the Court's attention and the Court is then proceeding against the client for that alleged failure.[1] The conflict of interest question of particular concern to the attorney in this situation arises only when

[1]The judicial proceeding is usually initiated by an order requiring the defendant to show cause why he should not be held in contempt for failure to pay the contribution order. Some judges make

the contribution order has been made payable directly to the attorney.

The Office of Bar Counsel of the Board of Professional Responsibility has joined the inquiring attorney in requesting the Committee's views on these two issues and has informed the Committee that "[t]he issues...have been of serious concern for a long period of time to hundreds of attorneys who practice in the Superior Court."

Discussion

A. *Disclosure of the Client's Failure to Pay Pay the Contribution Order*

Analysis of the first question properly commences with the fundamental principle in DR 4-101(B):

> Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.

Section (A) defines "confidence" as "information protected by the attorney-client privilege under applicable law" and defines "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." It is hard to imagine a situation in which an attorney's knowledge of the client's apparent failure to make payment on a contribution order would not constitute either a secret or a confidence of the client. Even if the client's apparent failure to comply with the contribution order is construed as a fraud upon the tribunal, it is clear under DR 7-102(B)(1) that the attorney is not obligated to disclose this information to the appointing court.[2] (Equally clearly, the lawyer should "promptly call upon his client to rectify" the situation.)

The exceptions to the basic prohibition on disclosure of client confidences and secrets are found in DR 4-101(C), which provides in pertinent part:

> A lawyer may reveal:
> (1) Confidences or secrets with the consent of the client or clients affected, only after full disclosure to them.
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
> ....
> (4) Confidences or secrets necessary to establish or collect his fee....

The first of these possible situations, authorization by the client to disclose his or her failure to comply with the contribution order, is not likely to arise very frequently and in any event is not likely to present any particular difficulties. Under the second exception, an attorney is clearly permitted to respond to a court's order to report whether the client has paid the contribution order (to the court or to the attorney); indeed, failure to comply with such an order would doubtlessly constitute a violation of the proscription in DR 7-102(A)(3) against "conceal[ing]...that which he is required by law to reveal" and in DR 7-102(A)(5) against "[k]nowingly mak[ing] a false statement of law or fact."

The last exception—disclosure of confidences or secrets in order to collect a fee—requires a determination of whether the court-ordered payments in fact constitute fees. Contributions which the Court has ordered to be paid to the attorney have all the important characteristics of attorneys' fees. Indeed, contribution orders may be entered only when the court has determined that the defendant has some funds available to defray part of the attorney's fees and other expenses in the case, D.C. Code § 11-2606(a), and the determination of each defendant's inability *vel non* to retain counsel, along with the corollary determination of the amount of the contribution order, is based in part on an assessment of what an attorney's fee and other expenses would be in the particular case if the defendant were able to retain the attorney. *See* Paragraph 4 of the *Standards of Eligibility Under the Criminal Justice Act*. Thus it is clear to the Committee that contribution orders payable by the client to the attorney constitute fees within the meaning of DR 4-101(c)(4). This conclusion means in turn that the attorney may disclose to the court a client's failure to comply with the court's order when the client has been ordered to pay the contribution order directly to the attorney.[3]

The Committee would hope, however, that before taking such a drastic step so directly inimical to the client's interest, the attorney would make certain that he or she has complied fully with the aspirational standards found in Ethical Considerations 2-19 and 2-23. EC 2-19 counsels attorneys to reach "a clear agreement" with each client "as soon as feasible" regarding the fee in each case and further reminds attorneys "that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes." In light of these principles, the Committee has previously concluded in its Opinion No. 4 that "...the attorney bears the responsibility for seeing that there is no likelihood of misunderstanding as to fee arrangements" and in Opinion No. 25 that the requirement for a clear agreement regarding fees is a "basic and fundamental rule that should be followed by all lawyers." The Committee believes that, in the context of contribution orders, these principles mean that an attorney should clearly describe to the client the provisions and purposes of the contribution order as soon as possible after being appointed and should equally carefully make arrangements with the client regarding the schedule by which the client will pay the contribution order to the attorney. Perhaps of even greater importance, EC 2-23 counsels that an attorney "should be zealous in his efforts to avoid a controversy over fees with his client," "should attempt to resolve amicably any differences on the subject," and "should not sue a client for a fee unles necessary to prevent fraud or gross imposition by the client." Accordingly, the Committee concluded in its Opinion No. 60 that "...such litigation should only be a last resort...."

The issue of whether contribution orders payable to the court (and not to the attorney) constitute fees within the meaning of DR 4-101(C)(4) is more difficult, but the Committee concludes that payments due to the court pursuant to such orders are not attorneys' fees. First, there is the obvious point that such payments go to the court and not to the attorney. Second, and of equal importance, the attorney will receive whatever payment he is entitled to under the Act for his services regardless of whether the client complies with the order. Thus the basic reason for permitting disclosure of secrets and confidences in order to collect a fee—i.e., to assure that the attorney continues to be able to provide legal services—does not pertain in this situation. Accordingly, the Committee concludes that the exception in DR 4-101(C)(4) for the collection of fees does not permit an attorney to disclose the client's failure to comply with a contribution order when the order provides for payment to the court.

B. *Withdrawal When the Client is Charge With Not Paying the Contribution Order*

The second question presented by the inquiring attorney is most directly addressed by DR 5-101(A), which provides that "a law-

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payment of the contribution order a condition of release pending trial or pending sentencing; in these situations the proceeding could also take the form of a hearing on the defendant's alleged failure to comply with his or her conditions of release.

[2]For example, in its Opinion No. 9, the Committee, concluded that under DR 7-102(B)(1) an attorney was not obligated to disclose to the Court that his client in a criminal case had obtained his pre-trial release by providing the Court with false information regarding his address and had also failed to abide by the conditions of his pre-trial release. Thus, the suggestion in the inquiring attorney's letter of some inherent "duty of informing the Court of such violation" is mistaken.

[3]At one point in her letter the inquiring attorney alludes to a broader issue:...[H]ow can that attorney competently represent the client, particularly when there is great potential for the attorney-client relationship to deteriorate to the point that the client avoids the attorney so as not to pay the required sum [?]" Thus stated, the situation is not significantly different, in the Committee's view, from any other in which a client fails to comply with the fee agreement. An attorney's alternatives and responsibilities in such instances are carefully analyzed in the Committee's Opinion No. 89. That opinion recognizes the basic right of an attorney under DR 2-110(C)(1)(f) to seek leave to withdraw when the client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees," subject of course to the obligation to take "reasonable steps to avoid foreseeable prejudice" to the client, especially where personal rights as opposed to commercial interests are at stake.

yer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interest." Although this provision speaks only in terms of accepting employment, the Committee assumes without any hesitation that it is equally applicable to situations arising during the course of an attorney-client relationship which affect the attorney's financial or other interests. Thus in each situation in which a lawyer is expected to represent a client against allegations that the client has failed to make a contribution order payment to the attorney, the attorney must determine whether his or her financial interest in receiving the payment will affect or may reasonably be expected to affect the exercise of his or her professional judgment on behalf of the client. If so, then, except in the unusual circumstance in which the client consents to the lawyer's continued representation after disclosure of the conflict, the lawyer must seek leave of the court to withdraw from the representation. And in such situation, the attorney must also be careful to comply with the requirements governing withdrawal as specified in DR 2-110. Finally, the lawyer is also required to seek leave to withdraw if "it is obvious that he...may be called as a witness...[and] that his testimony is or may be prejudicial to his client." DR 5-102(B). Being called as a witness to testify that the client has not paid the contribution in contravention of the court's order would clearly, except in the rarest of circumstances, be prejudicial to the client.

Inquiry No. 82-4-6
April 26, 1983

Opinion 127

DR 9-103—Withdrawal of attorney's fees from trust account established to receive proceeds of a settlement

Synopsis

DR 9-103 permits an attorney to withdraw a portion of a trust account established to receive the proceeds of a settlement in payment of his fee only when such fee is due and only if the right of the lawyer to receive the fee is undisputed by the client. It would violate DR 9-103 for an attorney to make withdrawals from such an account to pay his own expenses even if the amounts withdrawn are less than the agreed upon and undisputed amount of the attorney's fee.

The Inquiry

The presumed facts are that an attorney has received funds in settlement of a dispute and that the funds have been deposited in a trust account established in the client's behalf. Some of the deposited funds have been used to pay bills submitted by third parties for services rendered in connection with the matter, and a partial distribution has been made to the client. The inquirer asks whether withdrawals may be made from the fund by the lawyer to pay office and personal expenses if the amounts withdrawn are less than the fee owed by the client (it being assumed that the amount remaining in the account is sufficient to satisfy all remaining obligations to third parties).

Discussion

Disciplinary Rule 9-103 provides, in relevant part:

> Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer..., other than advances for costs and expenses, shall be deposited in one or more identifiable accounts..., and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
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> ***
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
>
> (B) A lawyer shall:
>
> (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
>
> ***
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
>
> (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

DR 9-103 is a successor to ABA Canon 22, which provided:

> The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.
>
> Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

The proscriptions of Canon 11 and its successor, DR 9-103, go beyond prohibiting a lawyer from cheating a client or absconding with a client's funds. In addition, the canon and the rule require a tight separation between the funds of the client and funds of the lawyer in order to protect those funds from possible attachment by the lawyer's creditors and to prevent the lawyer from being put in a position in which he might be tempted to misuse the client's funds or, through inadvertence or no more than sloppy bookkeeping, some misuse of client's funds might occur. *See generally* Note, *Attorney Misappropriation of Client Funds: A Study in Professional Responsibility*, 10 U. Mich. J.L.R. 415 *et seq.* (1977). As we stated recently in our Opinion 113:

> Generally, 'funds of a client' [as the phrase is used in Rule 9-103] are monies received by an attorney from a third party for the benefit of a client.... Some portion of these funds may undoubtedly be used to satisfy the lawyer's fee. Typically, these funds are properties of the client received from the sale of assets or settlement of a claim or estate and held temporarily by the attorney where the temptation for the attorney to use or confuse the client's assets with his own must be avoided. Hence, the detailed requirements for segregating and safeguarding these properties.... Under DR 9-103 an attorney may have a claim against some of the 'funds of a client' but only if the client agrees to the attorney's removal of the funds from the trust account.

Consistent with the purposes described, in applying Canon 11, ABA Informal Opinion 859 (August 4, 1965) concluded:

> In the absence of local law specifically authorizing such deductions, [and] if there is no agreement between the attorney and the client which would permit the deduction from escrow funds of the lawyer's suggested fee, the Committee believes it would be unethical for the lawyer to retain even what he believes to be a fair and reasonable fee for his services from such funds.... [I]n the absence of local statutory or case law on the subject, there would appear to be no authority to make the deduction, in the absence of a specific agreement between the attorney and the client.

DR 9-103, in contrast to Canon 11, explicitly provides that if an account contains "funds belonging in part to a client and in part presently or potentially to the lawyer...the part belonging to the lawyer... may be withdrawn *when due* unless the right of the lawyer and law firm to receive it is disputed by the client" (emphasis added), but this proviso is a limited exception to the general rule and should not be construed so as to eviscerate the underlying purpose of preventing lawyers from treating funds that belong to the client as their own. Thus, where the lawyer's fee is clearly understood and undisputed, and a prompt, complete and accurate accounting is made to the client, a lawyer may withdraw his fee from such a fund at the time when the fee is due to be paid. But, before that date, it would violate the rule and be contrary to its overriding purpose for a lawyer to make periodic withdrawals from such an account to pay office expenses, personal expenses and other obligations that are the lawyer's and not the client's, notwithstanding that the sum of such withdrawals is less than the attorney's fee that eventually will be due.

Inquiry 83-3-7
Approved: May 24, 1983

Opinion No. 128

Canon 4, DR 4-101—Donation to University Archive of Papers That Could Contain Client Confidences or Secrets

The inquirer, who has been asked to donate his papers to a university archive created to house documents relating to the development of United States domestic and foreign policy, has requested our opinion concerning the ethical propriety of donating his papers. To the extent that donation of the inquirer's papers would result in disclosure of the "confidences" or "secrets" of the inquirer's private clients, the inquirer may not ethically donate his papers without the prior consent of the affected clients. To the extent that donation of the inquirer's papers would reveal nonpublic information obtained while the inquirer was in government service, he must in addition to complying with applicable statutes and regulations, also determine whether the information constitutes "confidences" or "secrets" of a client (the government department or other person or entity) and obtain the consent of the client to the terms or conditions of the donation.

Facts

The inquirer has been asked by a university to donate his papers to an archive created to store the papers of certain individuals who have participated in the shaping of United States domestic and foreign policy. The purpose of the archive is to serve as a research facility for historians seeking access to raw materials concerning the development of government policies that would otherwise be unavailable. Although the university will store each donor's papers separately, subject to whatever restrictions the donor imposes, the purpose of the archive will best be served by donations made with minimal restrictions.

The papers of the inquirer that have been requested by the university reflect matters relating both to the inquirer's representation of private clients and to his activities as a former, high-level government employee. In the course of representing private clients, the inquirer has endeavored to affect government policy on behalf of those clients by writing letters to government officials, filing comments concerning proposed regulations and statutory changes, and by taking other similar actions. Accordingly, some of the papers arising from the inquirer's private practice have already been disclosed to third parties outside of the attorney-client relationship. Other papers arising from that practice, however, have not been disclosed to third parties.

In the course of his former activities as a government lawyer, the inquirer participated directly in the formulation of United States policy, and some of his papers reflect that participation. This category of papers includes copies of documents both generated and received by the inquirer in connection with this government employment. Some of those papers have now been disclosed to individuals outside of the government, while other have not.

Against this backdrop, the inquirer has asked four specific questions:

1. May a lawyer turn over to a university archive any papers reflecting his work and advice without obtaining the consent of affected clients? Obtaining the individual consent of clients who may be affected would probably be too time consuming and onerous. Is there some reasonable period of time after which a client could not reasonably object to the disclosure of a lawyer's work product in the setting of a historic archive? If so, what is the minimum time that would be "reasonable"?
2. Can distinctions be drawn between the persons to whom access might be granted by the donor, e.g., to "bona fide historians" who will not directly quote any material without first checking with the donor or his representative, but denying it to those who will not abide by such an agreement or to the general public?
3. Can distinctions be drawn between materials that have been otherwise disclosed and those that have only been communicated to clients or the lawyer's partners or associates? If, for example, a letter was filed with a government official on behalf of a client, would such a communication be free of restrictions? I am thinking in the context of my practice of letters written to, e.g., the United States Trade Representative or to Department of Commerce officials dealing either with contested cases or with the adoption of regulations or proposed statutory changes.
4. Is there any *ethical* consideration involved (as distinct from any legal constraint) in donating to the archive any papers written or received while in government service? Although my "files" were retained by the agencies for which I worked, I also have copies of most of what I wrote and of much of what I received.

Discussion

The inquirer's papers appear to contain information obtained in the course of representing both private clients and the federal government. Donation of those papers to a university archive would result in the disclosure of such information to individuals outside of the original lawyer-client relationship. Such disclosure is governed by Canon 4 of the Code of Professional Responsibility, which is designed to promote candor in lawyer-client communications by ensuring that the lawyer will not use information obtained from a client in inappropriate ways. Accordingly, Canon 4 requires a lawyer to preserve the "confidences" and "secrets" of a client. Those terms are defined by DR 4-101(A), which states:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Therefore, those portions of the inquirer's papers that contain information subject to the attorney-client privilege, information that the inquirer's clients have requested not be disclosed, or information that would embarrass or detrimentally affect the inquirer's clients if disclosed ethically may be donated to the archive only under the conditions enumerated in the remaining provisions of DR 4-101.

In pertinent part, DR 4-101(B) and (C) provide:

> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
>
> ***
>
> (C) A lawyer may reveal:
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them. [Footnotes omitted]
>
> ***

As the quoted language indicates, to the extent that donation of the inquirer's papers would result in the disclosure of confidences or secrets of the inquirer's clients, the prior consent of those clients to disclosure ethically must precede donation of the pertinent portions of the inquirer's papers to the archive. Such consent would be effective only if obtained after the affected clients had been fully apprised of the potential consequences of disclosure. *See* Opinions No. 124, 99 and 72. Moreover, the consent restriction applies to the inquirer's former clients, as well as to his present clients, *see* EC 4-6 and Opinion No. 124, and it continues to apply as long as the subject information continues to apply as long as the subject information continues to be held confidential by the client, the client has made a continuing request for nondisclosure, or disclosure continues to be potentially detrimental or embarrassing to the client.[1]

[1]The question of whether information remains confidential for attorney-client privilege purposes after changed circumstances such as the death of the client or disclosure by the client to third parties is a question of law to be resolved by the governing jurisdiction. The question of whether changed circumstances eliminate any potential detriment or embarrassment that might otherwise result from disclosure must be determined by the attorney contemplating disclosure, with doubts being resolved in favor of non-disclosure.

Therefore, those portions of the inquirer's papers relating to his private practice that contain client confidences or secrets can be donated to the university archive only with the prior informed consent of the inquirer's affected clients. In the absence of such consent, the inquirer ethically may donate those papers only after making whatever deletions are necessary to protect his client's confidences and secrets.[2]

The papers of the inquirer that relate to his former government service pose a more intricate problem. As an initial matter, it is important to emphasize that the Code of Professional Responsibility governs only the practice of law. It does not apply to nonlegal activities simply because they are performed by lawyers. Accordingly, papers reflecting those policymaking activities of the inquirer that did not constitute the practice of law are not subject to the prohibitions of Canon 4. The line between legal and nonlegal activities can be difficult to ascertain, but in making this determination, the inquirer can be guided by the general principle that the practice of law entails the actual representation of parties in legal proceedings, the preparation of legal documents, or the rendition of advice about the legal consequences of particular actions. *See* Rule 46 II.(b) of the Rules of the District of Columbia Court of Appeals. Moreover, government positions that can be filled by lawyers and nonlawyers alike typically do not involve the practice of law. Because of the policymaking nature of the inquirer's former government service, Canon 4 may well be inapplicable to many of the papers developed in the course of government service.

To the extent that the inquirer's papers reflect governmental activities that do constitute the practice of law, Canon 4 is pertinent. Canon 4 appears to have been drafted with only an attorney's representation of private clients in mind. In the context of private representation, DR 4-101 prohibits disclosure of the confidences and secrets of a client without the client's consent. Although that formula is quite serviceable as applied to private representation, the operative concepts are more difficult to apply in the context of government employment. Nevertheless, the Committee knows of no authority for the proposition that Canon 4 is inapplicable to government attorneys and their work. Accordingly, the inquiring attorney is ethically obligated to determine that his donation of papers reflecting his legal work while in governmental service is consistent with Canon 4.

Generally, government lawyers are viewed as if the clients that they represent are their governmental employers. For purposes of ascertaining their obligations under the Code of Professional Responsibility, we have so viewed government lawyers in the past, *see, e.g.*, Opinions No. 106 and 84, as have the courts. *See, e.g., Coastal States Gas Corp.* v. *Dept of Energy*, 617 F.2d 854, 862-64 (D.C. Cir. 1980); *Mead Data Central* v. *Dept of the Air Force*, 566 F.2d 242, 252-55 (D.C. Cir. 1977). Compare 28 CFR 45.735-1(b) (1982) (requiring Department of Justice attorneys generally to comply with the provisions of the Code of Professional Responsibility). This seems also to be the view of the Federal Bar Association. Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1541 (1974).

The consent provisions of DR 4-101(C)(1) may be difficult to apply in the context of government service. First, it may not be clear which government official has the authority to consent to disclosure in particular circumstances. Moreover, in light of the Code's concern for the interests of former as well as present clients, it could be that, under certain circumstances subsequent administrations would be unable to consent to the disclosure of material relating to prior administrations, or that the consent of both or even several administrations must be obtained, or that the present administration can consent even though the administration officials in office at the time the legal services actually were performed object to disclosure.

Unlike private clients, the government has the power to make laws governing the disclosure of nonpublic information by its employees. Where disclosure of information would seriously harm our national interests, the government has the power to classify that information, which in certain circumstances makes disclosure a federal crime. *See* 18 U.S.C. § 798; 50 U.S.C. § 783. Moreover, disclosure of confidential information submitted to the government by private parties is also a federal crime. *See* 18 U.S.C. § 1905; *see also* the Privacy Act, 5 U.S.C. § 552a. In addition, the government has made it a crime to disclose many particular categories of information such as crop information that could be used for financial speculation, certain information that could affect the value of securities, or information obtained in the course of a bank examination. *See* 18 U.S.C. §§ 1902, 1904, and 1906, respectively. Other statutes, however, such as the Freedom of Information Act, 5 U.S.C. § 552, contain an affirmative grant of public access to government information, with specified exemptions.

Statutory restrictions on the disclosure of information by government employees are supplemented by a maze of administrative agency regulations that contain expansive restrictions on disclosure. The Office of Personnel Management has promulgated regulations that both preclude all government employees—lawyers and non-laywers alike—from making unauthorized disclosures of nonpublic information and provide various mechanisms through which employees may seek authorization. *See* 5 CFR §§ 735.203, 735.206, 735.209 and 735.303. In addition, individual agencies are required to promulgate regulations tailored to their particular needs, *see* 5 CFR § 735.104, and the inquirer's former agency has promulgated regulations that also prohibit unauthorized disclosure of nonpublic information. *See* CFR §§0.735-39 and 0.735-47. Moreover, the Office of Government Ethics is authorized to issue advisory opinions to assist government employees in complying with their ethical obligations, including their obligation to avoid unauthorized disclosure of nonpublic information. *See* 5 CFR §§ 738.301-738.313. The statutory and regulatory provisions not only impose broad legal prohibitions on the disclosure of nonpublic information but also give many government officials a role in determining whether particular disclosures should be authorized. Compliance with the applicable statutory and regulatory requirements in a particular situation may sometimes or even often coincide with the requisite steps mandated by DR 4-101(C)(1). However, the attorney's ethical obligations and constraints remain distinct from his legal/regulatory obligations, and the attorney must be certain that he has complied with both groups of requirements.[3]

In light of the foregoing discussion, we offer the following answers to the specific questions posed by the inquirer:

1. A lawyer may not donate to a university archive papers disclosing the confidences or secrets of his or her private clients without first obtaining the informed consent of the lawyer's affected clients. This is true regardless of the passage of time or changed circumstances as long as the underlying information continues to constitute a "confidence" or "secret" within the meaning of DR 4-101(A).
2. Donor-imposed restrictions on access to papers disclosing client confidences or secrets are not sufficient to avoid the ethical restrictions on disclosure unless they are agreed to by the affected clients.
3. Distinctions between materials that have and have not been disclosed to third parties outside of the lawyer-client relationship can be relevant

[2]Because of the absolute nature of the consent requirement in those cases to which it applies, the need to obtain client consent could not be obviated by limiting the scope of disclosure or by imposing restrictions on access to disclosed information. With respect to confidences, any disclosure beyond the confines of the attorney-client relationship would require client consent, and with respect to secrets, any disclosure that would violate a client's request for secrecy, embarrass, or detrimentally affect a client would require client consent, no matter how limited those disclosures might be.

[3]Consistent with Legal Ethics Committee Rule C-5, we take no position on whether or to what extent applicable law would ultimately permit disclosure or whether disclosure would be inconsistent with any property interest that the government might retain in the papers of the inquirer.

under applicable law in determining whether a "confidence" exists within the meaning of DR 4-101(A). Outside disclosures can also serve as evidence that a client does not consider particular information to constitute a "secret" within the meaning of DR 4-101(A). However, if disclosure of certain information would embarrass or detrimentally affect a client, that information would continue to constitute a "secret" despite its nonconfidential nature, and additional unauthorized disclosures would be prohibited.

4. The ethical prohibitions on disclosure of client confidences and secrets also govern the donation to a university archive of papers relating to a lawyer's former government service.

Conclusion

The protections accorded client "confidences" and "secrets," as those terms are used in DR 4-101(A), preclude an attorney from donating to a university archive papers that might reveal the confidences or secrets of the attorney's private or governmental clients* without either obtaining the prior informed consent of those clients or deleting those portions of the attorney's papers that contain confidences or secrets.

Separate Opinion of Three Members, Concurring in Part and Dissenting in Part

The majority concludes that there is no ethically pertinent distinction between the papers generated in the course of the inquirer's private practice and those generated in the course of his legal work while in government service; with respect to both types of papers, the inquirer must obtain the consent of his former "clients" before disclosing to a university archive any papers that reveal client confidences or secrets. The majority's conclusion with respect to the papers generated in the course of the inquirer's private practice is sound and squarely governed by the provisions of Canon 4. However, it is difficult to find merit in the majority's assertion that independent ethical, as opposed to legal, restrictions apply to the papers reflecting the inquirer's former government service. Because the pervasive legal restrictions governing disclosure of nonpublic information strike a delicate balance between competing societal interests, Canon 4 should not be read to impose extraneous requirements that would upset that balance.

As the majority opinion points out, disclosure of nonpublic information by all government employees—lawyers and nonlawyers alike—is governed by an intricate scheme of statutory and regulatory provisions that contains both broad prohibitions on the unauthorized disclosure of all nonpublic information and additional narrow prohibitions on the disclosure of many specific types of information. In addition, those statutes and regulations specify not only the ways in which consent to disclosure can be secured, but ways in which advisory opinions may be obtained to help clarify any ambiguities.

Realistically, the scheme of governing statutes and regulatory provisions strikes the balance between two competing social policies. On the one hand, the government has a legitimate need to ensure the degree of confidentiality required to facilitate the free exchange of ideas between government officials. On the other hand, restrictions on disclosure of government information should not be so stringent that the public is denied access to information that it is genuinely entitled to receive, or so protective that government officials are free to hide serious misconduct behind a screen of confidentiality. The proper balance is difficult to strike, particularly where, as here, the information at issue is of long-term historical interest, having First Amendment overtones. In particular cases, therefore, once that sensitive balance has been struck by the governing principles of law, it should not then be upset by a strained reading of Canon 4.

Canon 4 operates by requiring lawyers to obtain the "consent" of their "clients" before disclosing confidences or secrets, but it nowhere defines the "client" who must give "consent." In the context of government employment, it can be quite difficult to determine who the "client" is. Government lawyers work for particular supervisors in particular agencies during particular administrations, but they *represent* the government as an entity, which in turn represents the interests of the public. Because the interest of individual supervisors, agencies or administrations can diverge from the interests of the government as a whole or the public interest, it is not always clear whether a particular disclosure would advance or frustrate the interests of the government lawyer's "client." For example, disclosure of misconduct on the part of a lawyer's supervisor—such as the disclosures that occurred during the various Watergate investigations—would adversely affect the interests of the individual supervisor but would benefit the government and the public interest by facilitating remedial and preventive actions.

Uncertainty about the identity of a government lawyer's "client" also makes it difficult to determine whether a lawyer-client privilege exists within the meaning of the DR 4-101 prohibition on disclosure of client "confidences," or whether knowledge of nonpublic information by present or former government lawyers or non-lawyers would undermine the confidentiality necessary to the continued existence of the lawyer-client privilege. Likewise, it is very difficult to determine whether potentially embarrassing information constitutes a client "secret" within the meaning of DR 4-101 without first identifying the "client" whose embarrassment is to be avoided.

In the midst of so much uncertainty, it would seem natural to adopt the concepts of "client" and "consent" that emerge from the statutes and regulations governing the disclosure of nonpublic government information. In so doing, the balance struck by those provisions of law between the competing social interest would be preserved. Moreover, such a reading of Canon 4 would prevent the legal and ethical restrictions on disclosure from conflicting with each other by making them harmoniously coextensive. Rather than adopt a coextensive reading of the legal and ethical standards, however, the majority insists on carving out an independent set of ethical restrictions on disclosure.

The majority opinion is curious in three respects. First, it fails to give any indication whatsoever of how a lawyer is to secure the "consent" of a "client" if not through the traditional legal channels. Although the majority recognizes the serious ambiguity in identifying the "client" of a government lawyer, it offers no advice for resolving that ambiguity. It merely cautions attorneys to comply with both legal and ethical obligations. *See* text accompanying note 3 of the majority opinion. The inquirer is never told who must consent to what disclosures in order to satisfy Canon 4, but only that in some unspecified circumstances he must obtain the consent of some unspecified individuals in addition to the consents that he is required to obtain by law.

Second, the majority fails to explain why it is necessary to depart from the established legal standards governing disclosure. If the balance between the competing interests struck by the comprehensive statutes and regulations is to be displaced by Canon 4 of the Code of Professional Responsibility, it should only be because Canon 4 does a bet-

*The heart of the dissent's disagreement with the Committee's conclusion in this respect may be found in the observations that "restrictions on disclosure of government information should not be so stringent that the public is denied access to information that it is genuinely entitled to receive, or so protective that government officials are free to hide serious misconduct behind a screen of confidentiality" and that "[t]he public will then be the loser because it will be deprived of important information about the operation of its government that could be of both immediate and historical value." It is not the role of this Committee to incorporate such fundamental policy judgments into its review of the possible application of the Code of Professional Responsibility to particular situations absent some indication in the Ethical Considerations or other sources that such factors should inform interpretation of the Disciplinary Rules. Such considerations are solely within the purview of the Court of Appeals when it adopts and amends the Code. Moreover, it is certainly not uncommon for an attorney's various obligations to his or her client under Canon 4 and other Canons to conflict with what might generally be considered the broader public interest; such conflict is inherent in a legal system that protects and fosters the right of each individual or organization to have an attorney champion the client's interests without compromise.

ter job of striking the proper balance than do the controlling provisions of law. However, as the majority itself recognizes, Canon 4 was drafted to govern private representation, not to strike the balance between the competing needs for government secrecy and government disclosure. Therefore, if one provision must yield to the other, Canon 4 should yield to the provisions of law, enacted by the President and politically accountable legislators, that are more comprehensive and more precise than the Code of Professional Responsibility.

Third, it is difficult to understand why independent ethical standards would be desirable even if one could understand what those standards required an attorney to do. The majority's position would make sense only if there were some document which, although perfectly legal to disclose, should nevertheless be kept secret because the governing law provided insufficient protection. Such a state of affairs might arise if the drafters of the pertinent statutes and regulations overlooked a certain situation, but this is extremely unlikely in light of the extraordinary breadth of the governing legal provisions—provisions that apply to every officer or employee of every government agency. *See* Exec. Order 11222, §§ 205 & 705 (May 8, 1965), 30 *Fed. Reg.* 6469-73 (May 11, 1965). If there are any executive employees who are not governed by the applicable legal provisions, the omission is more likely to have been by design than through oversight. Moreover, the President could easily correct any perceived inadequacies in the controlling law simply by issuing a new executive order.

It is natural to read Canon 4 as coextensive with applicable law in ascertaining the meaning of the operative Canon 4 concepts, but it would require a strained reading to permit Canon 4 to supplant the controlling legal provisions. Nevertheless, the majority concludes that such a strained reading is desirable. The real danger in the majority position is that by creating so much uncertainty and imprecision with respect to the ethical restrictions on disclosure of government information, lawyers will conclude that the risk and inconvenience involved in making such disclosures—even after disclosure has been authorized as required by law—is too great to warrant the effort. The public will then be the loser because it will be deprived of important information about the operation of its government that could be of both immediate and historical value. To prevent this, Canon 4 should be read as coextensive with applicable law concerning the disclosure of government information.

Inquiry No. 83-4-8
July 19, 1983

Opinion No. 129

DR 1-102(A)(4); DR 7-104(A)(1) and (2)—Interviews With Employees Of An Adverse Party

Synopsis

DR 7-104(A)(1) bars a lawyer who represents a client with a claim against an organization from contacting, without the consent of opposing counsel, any person who can bind the organization as to the litigation. The Rule does not bar contacts with employees of the organization who do not have such authority. However, before conducting an interview with such an employee, the attorney or his agent must disclose his identity and the fact that he represents a party who has a claim against the employee's employer.

Facts

The inquirer represents a plaintiff in an employment discrimination suit against a large corporation. He has asked the Committee whether he ethically may interview two lower level management officials whose sole function in the selection process which is the subject of the litigation was to make recommendations with respect to his client's advancement.

Discussion

The relevant Disciplinary Rule which governs communications with an adverse party, DR 7-104, provides:

> (A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
> (2) Give advice to a person who is not represented by a lawyer other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

The issue raised by this inquiry is whether the employees of the defendant corporation whom the inquirer wishes to interview are "parties" within the meaning of DR 7-104 (a)(1). We conclude that they are not.

With respect to corporate employees, the ABA Committee on Ethics and Professional Responsibility has limited the definition of "party," as used in DR 7-104(A)(1), to individuals who can "commit the corporation because of their authority as corporate officers or employees or for some other reason the law cloaks them with authority." ABA Informal Op. 1410 (1978) (communication with officers and employees of nationwide corporation). The rationale underlying this definition is that when a person can commit the corporation, opposing counsel must regard them as an "integral component of the...corporation itself and therefore within the concept of a 'party' for the purposes of the Code." *Id. See also* ABA Informal Op. 1377 (1977) (communication with officer of municipal corporation).

These precedents, however, do not completely resolve the issue presented in this inquiry. Does the definition of "party" include only those who have authority to commit the corporation with respect to the litigation, or does it extend to those who have authority to commit the corporation with respect to the underlying matter but not with respect to the litigation? For example, in an employment discrimination case against a large corporation, the officials who have authority to make litigation decisions are not likely to be the same officials who made the contested hiring or promotion decisions. Plainly, DR 7-104(A)(1) prohibits contact with the former without the consent of counsel, but does it also prohibit contact with the latter? We conclude that it does not.

ABA Formal Opinion 127 (1934) is squarely on point. There the Committee held under former Canon 9 that an attorney for a plaintiff injured in a store could interview the store's clerks who were witnesses to the accidents.[1] "Canon 9 does not forbid interviews with employees of the opposite party," the Committee stated. "It is the party (not the clerk in the store) who is represented by counsel." *Id.*

This Committee's Opinion 80, which addressed the question of what government officials are covered by the prohibition of DR 7-104(A)(1), also supports our conclusion here. In that context, we held that:

> The officials who are deemed to be government "parties" with whom communications under the rule are restricted are quite limited, including only those persons who have the power to commit or bind the government with respect to the subject matter in question, whether it be the initiation or termination of litigation, execution or approval of a contract, issuance of a license, award of a government grant, or a rulemaking function.

The rationale that we adopted in Opinion 80 supports the result that we reach here:

> It is of course important that the identification of such officials be no more inclusive than necessary to serve the purposes of the rule, so that there will be no unnecessary hindrance to the search for information or the pursuit of grievances. The lines may not be drawn so widely as to include all government employees at whatever level of responsibility, for of course not all employees can speak for or commit their employer, whether it be public or private. Nor should the rule extend to government employees who are merely witnesses, or otherwise sources of information, but who have no decisional authority with regard to the subject matter of the representation, for such an extension would inhibit the search for truth without protecting any governmental interest legitimately sought to be protected by the rule.[2]

[1] Canon 9 provided: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel."

[2] It may be argued that the "subject matter in question" includes both the pending litigation and the underlying decision which gave rise to the litigation. However, Opinion 80 was concerned with contacts by private lawyers in a wide variety of non-litigation circumstances where the govern-

A similar balancing of the competing policies at stake in the instant inquiry supports a limitation on the scope of DR 7-104 (A)(1). In Opinion 80, we noted that the following policies have been advanced in support of the prohibition against communications with an adverse party: (1) the presumed imbalance of skill between a lawyer and a layman, giving one an unfair advantage over the other; (2) the risk that an uncounseled party will make admissions or concessions or reach judgments from which his lawyer could protect him; and (3) the risk that a lawyer might be compelled to become a witness in a case or forced to choose between advancing his client's interests and not overreaching in communicating with an unprotected adverse party. Opinion No. 80.[3] However, the Committee also expressed skepticism as to the validity of these concerns. "The extent to which these dangers exist is, in our view, open to serious question." *Id.*[4]

On the other hand, restrictions on interviews with potential witnesses frustrate the policy that lawyers should be able to gather all relevant facts in an expeditious and economic manner. As the ABA Committee on Ethics and Professional Responsibility long ago stated, "[t]he ascertainment of truth is always essential to the administration of justice and it is the duty of the attorney to learn the facts by every fair means within his reach." ABA Formal Op. 117, *supra*.

In our Opinion 80, the Committee balanced the costs of restricting contacts with prospective witnesses against the purported dangers of such contacts. We opined that "where the dangers are not illusory, they are nevertheless outweighed by the cost to clients of applying DR 7-104(A)(1), whether those clients are involved in litigation or other legal matters with the government, or private corporations or individuals." Applying this reasoning to the instant inquiry, we believe that interpreting DR 7-104(A)(1) to protect all employees of a large organization would be too restrictive and would conflict with the policy of unhindered and inexpensive access to non-party witnesses in the litigation context. Such a restrictive application of the rule would require a party to expend greater time, money, and resources in obtaining the same information through informal interviews. These manifest burdens, we believe, outweigh any potential harm that might flow from permitting counsel to interview employee-witnesses of the sort involved in this inquiry.

The dissent argues that DR 7-104(A)(1) should protect an organization from the possibility that its employees might make damaging admissions if opposing counsel is permitted to interview employees without the consent of the organization's counsel. However, we reject the contention that the Rule should be used as an obstacle to obtaining relevant information. The argument that counsel should be able to control the flow of information from non-party witnesses is simply inconsistent with the principle that litigation is a search for truth rather than a sporting contest. To require the consent of counsel for interviews with such witnesses would place too heavy a burden on the fact-gathering process.

Accordingly, we conclude that DR 7-104 (A)(1) requires consent of opposing counsel only for contacts with employees of an opponent organization who have the authority to bind the organization with respect to the pending litigation. Since the employees whom the inquirer wishes to contact are not individuals who have such authority, there is no ethical bar to contacting these employees.

In conducting such an interview, a lawyer must not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." DR 1-102(A)(4). Moreover, the majority of the American Bar Association opinions on the subject of witness interviews hold that an attorney has an affirmative duty to disclose his identity as an attorney representing a party with a claim against a prospective or actual defendant, and we adopt this approach.

ABA Formal Op. 117, *supra*, held that an attorney for a claimant may interview employees of a prospective defendant, "provided no deception is practiced in obtaining their statements and they are informed that the person interviewing them is the attorney for the claimant or represents him."[5] Two opinions dealing with interviews of prospective defendants not yet represented by counsel also impose an affirmative duty on the attorney and his investigators to disclose that they are seeking information on behalf of a potential claimant. ABA Informal Op. 908 (1964); ABA Informal Op. 670 (1963). While there are factual distinctions between a defendant and a witness-employee of a defendant, we do not think that the differences are sufficient to diminish the duty to disclose.

ABA Informal Op. 581 (1962) takes a more permissive approach with respect to disclosure, which we decline to follow in the circumstances presented by this inquiry. The inquiry asked whether counsel for a criminal defendant or his investigator must inform a witness whom he is interviewing that he comes from the defense camp. The Committee responded that "if inquiry is made by the witness of the investigator as to whom he represents, it would be the duty of the investigator to disclose that he comes from the defense. Absent such inquiry, we think there is no duty on defense counsel or his investigator to inform the witness of whom he is representing."

Whether we would agree that there is no duty of disclosure in the circumstances presented by ABA Informal Op. 581 is a question we need not decide at this time. It is sufficient for our present purposes to note that the inquiry there concerned an interview by counsel for a criminal defendant of a witness who was not an employee of the prosecutor, and therefore the opinion is distinguishable from the instant inquiry. In the circumstances presented by this inquiry, we conclude that an attorney or his agent must disclose his identity and the fact that he represents a client with a claim against the employee's employer.

Finally, we note that in contacting employees of an organization, a lawyer should take care not to violate DR 7-104(A)(2), which forbids giving advice to an unrepresented person, other than advice to secure counsel, when that person's interests are or have a reasonable possibility of being in conflict with the interests of the lawyer's client. The need for care on this score is particularly acute if there is any possibility that the employee being interviewed is a potential defendant.

Dissent of Two Members to Opinion No. 129

The Committee's Opinion No. 129 concludes that the employees of a corporation sued upon charges of employment discrimination, "whose sole function in the selection process which is the subject of this litigation was to make recommendations with respect to" the plaintiff's advancement, may be interviewed by plaintiff's attorney. The Opinion bars communication without the consent of opposing counsel only with those employees of an adversary organization who can "bind" the organization as to the subject litigation. This category is interpreted to mean those officers or employees who can decide for the corporation on how

ment might be represented by counsel, and this fact accounts for the references to non-litigation matters in the opinion. Thus, we do not think that the Opinion 80 stands for the proposition that the rule extends to an individual who may have had responsibility for a decision that gave rise to litigation but who has no authority for the litigation. Indeed, the subsequent reference to employees "who have no decisional authority with regard to the subject matter of the representation" confirms this reading of the opinion. Moreover, extension of the Rule to parties who no longer have authority would be inconsistent with the underlying rationale of Opinion 80 that a party should not be unduly hindered in the quest for relevant evidence.

[3]*See also* EC 7-8 ("[t]he legal system...functions best when persons in need of legal advice or assistance are represented by their own counsel").

[4]In reaching this view, Opinion 80 cited a law review article which challenges the traditional rationale for DR 7-104(A)(1). Leubsdorf, *Communicating With Another Laywer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. Pa. L. Rev. 683, 686-88 (1979).

[5]Formal Op. 127 (1935) held that a lawyer representing a claimant can interview a witness who had been subpoenaed by the other side, provided that no deception is practiced by the lawyer. Although this opinion does not discuss an affirmative duty to disclose, disclosure seems implicit in the circumstances.

to end the litigation.

We believe the Committee's Opinion gives too narrow a reading to the prohibition of DR 7-104(A)(1), which bars a lawyer from communicating or causing another

> to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

In our view, the applicable authorities would also bar such communications with any employee who could bind the organization, by admissions or otherwise, as to the matters which gave rise to the litigation. The obvious purpose of DR 7-104(A)(1) is to prevent a lawyer from taking unfair advantage of an opposing party, and to assure that the opposing party has the full measure of the right to be represented by counsel. This purpose of DR 7-104(A)(1) is not fulfilled by limiting its coverage to individuals in an organization "who can bind it as to the litigation."

Most organizations, including corporations, can only act through their agents, and an agent whose acts allegedly create corporate liability in most instances becomes personally liable as well. As the Committee's Opinion recognizes, often those whose actions create the corporation's potential liability are not in positions of authority sufficient to make decisions about the ensuing litigation. For example, as we read the Opinion, it is perfectly proper for the attorney for a plaintiff in a personal injury case arising out of alleged negligent operation of a delivery truck, to give the employee who drove the truck a release or covenant not to sue and then, without adivisng the employee's attorney, interview that employee. The statements made by the employee in that setting would be admissible under Federal Rule of Evidence 801(d)(2)(D), and the rules of evidence of jurisdictions that have adopted a similar rule, as a statement by an "agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."[1]

While the Opinion gives only those with authority to "commit" or "bind" the organization with respect to the litigation and its settlement the protection of DR 7-104(A)(1), it also recognizes that the Rule's goal is more than to provide counsel's advice in the settlement phase; it agrees that one of the policies underlying the prohibition is "the risk that an uncounseled party will make admissions or concessions or reach judgments from which his lawyer could protect him." It follows then that the Rule should preclude communications with individuals within an organization whose statements could bind the organization at trial. If the employee's or official's statement could be used as admission against the organization, the individual should not be contacted without the consent of the organization's counsel.

The scope of the prohibition will vary depending upon the size of the organization and the issues in dispute in the litigation. In a broad-scale antitrust case against a major corporation, the number of individuals knowledgeable as to the development of the corporate policies in dispute might be relatively small. If so, many corporate employees might be contacted to determine their knowledge of facts without the consent of the corporation's counsel because presumably they could not make admissions concerning the predatory intent of a corporate course of action.

In a sex discrimination suit against the same corporation, however, a dispositive admission could be procured from a low level supervisor in the corporation's smallest branch office. If the supervisor were to admit to plaintiff's attorney that the plaintiff was not hired or promoted because women are not permitted to hold certain positions in the company, such a statement would surely constitute an admission against the corporation.[2] We believe that in such a case the supervisor, as the agent of a party represented by counsel, should be available to opposing counsel only pursuant to the consent provided by DR 7-104(A)(1).[3]

The Committee's Opinion justifies its very restrictive determination of which persons within an organization are not to be freely communicated with by the argument that

> interpreting DR 7-104(A)(1) to protect *all* employees of a large organization would be too restrictive and would conflict with the policy of unhindered and inexpensive access to non-party witnesses in the litigation context. (Emphasis added.)

It does not follow that a broader spectrum of employees than those few who can "bind" the organization in the litigation will necessarily mean that *no* employee of the organization may be contacted without consent of the organization's counsel.

The group of persons whom the Opinion would include within DR 7-104(A)(1) is far too limited. For example, since individual directors of a corporation cannot bind the corporation, it would appear to follow from the Committee's Opinion that the members of the Board of Directors of a corporate defendant could be contacted without the consent of the corporation's attorney; that does not seem at all an appropriate or a bona fide application of the Rule.

With all due respect, we think that neither ABA Formal Opinion 127 (1934) nor this Committee's Opinion No. 80 support the present Opinion. In Opinion No. 127, the issue was liability for an accident on the premises of a store, and there is no indication that the store's clerks (that the Opinion found it to be ethically unobjectionable to be interviewed) had any responsibility for causing the injury. The matter of what government officials are deemed "parties" for purposes of DR 7-104(A)(1) is a question involving complex policy matters including the constitutional rights of access to government as well as other questions about governmental relationships.

The Opinion's reliance on ABA Informal Opinions 1377 (1977) and 1410(1978) also is misplaced. In both Opinions, the rationale was stated, in very general and ambiguous terms, to be that those who can "commit the corporation" [sic] are to be considered "within the concept of a 'party' for the purposes of" DR 7-104(A)(1). No elaboration of what is meant by the phrase "commit the corporation" is provided in either Opinion. Both Opinions say, however, that in the circumstances considered, "this right of the corporation to representation by counsel must prevail over opposing counsel's unrestricted access to officers and employees of the corporation." This rationale, supporting a conclusion that consent of the organization's counsel was necessary, is no authority for the present Opinion, which reaches a different conclusion.

As we see it, the virtue of the Committee's Opinion is its susceptibility to mechanical application. However, its vice is its inconsistency with the intent and purpose for DR 7-104(A)(1).

Lastly, we note that the ABA Model Code of Professional Conduct, in Comment upon the rule equivalent to DR 7-104(A)(1), states that the rule:

> ...prohibits communications...with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Inquiry No. 82-11-17
September 20, 1983

[1]The same result might obtain even if the employee's statement were hearsay; *see* Rules 803(b)(3) and 801(d)(1).

[2]*See* Fed. R. Evid. 801(d)(2)(D). Fed. R. Civ. P. 30(b)(6) is also relevant here. Certainly the officials and employees most likely to be designated as corporate representatives because of their unique knowledge of the corporation's policies, or its implementation thereof, should not be contacted without the corporate attorney's consent.

[3]One of the dissenters is of the view that because DR 7-104(A)(1) seeks to prevent taking unfair advantage of a party, the Rule precludes opposing counsel from interviewing former employees of the organization without consent of the organization's attorney so long as the former employee's actions, when employed, might bind or commit the organization on a subject that is involved in the litigation.

Opinion No. 130

DR 1-102(A)(5); DR 2-108(B)—Offer of Settlement Restricting Attorney's Right to Represent Potential Clients

Synopsis

The insistence on or acceptance of a settlement agreement term preventing the plaintiff's attorney from representing future clients against the defendant is unethical. However, if demand for such a term is made during negotiations previously agreed to be held in confidence, there is no disciplinary rule in effect in this jurisdiction that compels its disclosure. On the other hand, there is also no disciplinary rule that independently precludes such disclosure.

The Inquiry

The inquiring attorney represents the plaintiff in an action brought against a government agency. The plaintiff was successful in an original proceeding, and the matter is now before an agency review board. If the original decision is affirmed, the inquirer will be entitled to submit an application for attorney's fees to the Board in a subsequent proceeding.

During the pendency of the appeal, settlement discussions were begun. As a precondition to those discussions, the parties agreed that the details of the negotiations would not be revealed to the Board.

During the settlement negotiations, as part of an overall settlement package, government counsel demanded that the inquiring attorney agree not to represent any client against the agency for a period of years. The inquiring attorney did not agree to the demand on the ground that it was unethical, and, as a consequence, litigation has continued.

The inquiring attorney asks two questions: (1) Is a settlement offer conditioned upon his refusal to represent other parties against a government agency ethical? (2) If it is unethical, in support of his application for an attorney's fee, may he reveal that such a demand was made in order to show that the continuation and expense of litigation resulted, in part, from government counsel's insistence on an unethical settlement provisions, notwithstanding the agreement that settlement negotiations remain confidential?

Analysis

1. *Propriety of the settlement demand*

DR 2-108(B) provides that:

> "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law."

In our Opinion 35 this Committee construed DR 2-108(B) to forbid a settlement provision almost identical to that involved in this inquiry. In reaching that conclusion we reasoned:

> "The words [of DR 2-108(B)] are unambiguous: in connection with the settlement of a controversy or suit a lawyer may not make an agreement that restricts his right to practice law. An agreement by the lawyer that he will not represent anyone who has a claim against the settling defendant is clearly a restriction of the lawyer's right to practice law."

We also concluded in Opinion 35 that an agreement that forbade the plaintiff's attorney to refer potential claimants to another attorney would be improper. Although our rationale again focused on the restriction that would be placed on the settling attorney's practice, we noted that this arrangement "would restrict the right of *another* lawyer to practice as a consequence of an agreement entered into by the inquiring lawyer." (Emphasis in original.)

As recognized in Opinion 35, in the final analysis, "it is the public's rights that must be safeguarded. DR 2-108(B) is an assurance of the public's right to counsel through the lawyer's right to practice." Therefore, it is clear that an attorney, absent special circumstances,[1] cannot ethically accept an arrangement restricting either his future representation of clients *or* such representation by another lawyer.

Our Opinion 35 did not, however, address the specific question of whether the proposal and insistence upon such a restrictive settlement provision is also unethical, absent its acceptance. We now address that question and find that it is.

In its Informal Opinion 1039 the ABA Committee on Ethics and Professional Responsibility found that a defense attorney's insistence upon a restrictive settlement term nearly identical to the provision at issue was ethically improper.[2] The ABA Committee reasoned that such a demand

> "imposes undue restriction upon the plaintiff attorney [, and] it is improper for the attorney representing the defendants to demand this kind of covenant . . . ."

We agree. Although our Opinion 35 only dealt with the propriety of counsel's accepting a restriction on his practice, we concluded that the entire "arrangement" would be unethical. Moreover, our rationale in Opinion 35 is also applicable here. In Opinion 35 we stated that "DR 2-108(B) is an assurance of the public's right to counsel through the lawyer's right to practice." From that we concluded that the restriction of another lawyer's practice by an agreement not to refer clients was as improper as the restriction of one's own practice. The same principle applies to insistence by one attorney that another restrict his practice as a condition of settlement.

More generally, a lawyer should neither violate a disciplinary rule nor insist that others do so. The first part of this proposition is based on DR 1-102(A)(1) which explicitly prohibits a lawyer from violating a disciplinary rule. The second part is a necessary corollary of the first. As stated in Ethical Consideration 1-5:

> "A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise."

This ethical consideration is codified in Disciplinary Rule 1-102(A)(5) which provides that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." Allowing one lawyer to insist that another violate a disciplinary rule is inconsistent with maintaining the integrity of the bar and a violation of DR 1-102(A)(5).

2. *Propriety of disclosing an ethical violation which occurred during confidential settlement discussions*

The inquirer's second question asks whether an attorney may disclose an ethical violation which occurred during confidential settlement discussions in order to support the inquirer's application for attorney's fees. A preliminary question is whether the inquirer has a duty to report his opponent's ethical impropriety to an appropriate tribunal or authority.

DR 1-103(A) of the American Bar Association Model Code of Professional Responsibility provides that:

> "A lawyer possessing unprivileged knowledge of a violation [of a disciplinary rule] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

The rule adopted by the District of Columbia Court of Appeals is different. DR 1-103 (A) of the District of Columbia Code of Professional Responsibility states:

> "A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges."

The primary difference between the ABA and District of Columbia disciplinary rules is that the ABA rule imposes a mandatory duty to report disciplinary violations. The D.C. rule does not require such disclosure except in response to inquiry by an investigating authority.

Although D.C. Ethical Consideration 1-4 states the aspiration that "a lawyer should reveal voluntarily to [the proper] officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the disciplinary rules," there is no affirmative duty placed on a lawyer by the disciplinary rules to report ethical violations in the absence of a specific request. Since there is no absolute requirement that disciplinary violations be disclosed, there is no Distri of Columbia disciplinary rule that can b said to override any contract or understanding as to confidentiality that may exist.

On the other hand, there is also no District of Columbia disciplinary rule that forbids disclosure of unethical conduct in the

[1] Opinion 35 notes that a court approved settlement may be an exception to the general rule that such covenants are prohibited. However, we did not then, nor do we now, consider that question absent specific circumstances presented to us.

[2] Although Informal Opinion 1039 was based on the now superseded Canons of Professional Ethics, the reasoning and policy of the opinion remains valid and was adopted by this Committee in our Opinion 35.

absence of a request for information from a disciplinary authority. As indicated above, Ethical Consideration 1-4 provides that conduct believed to violate ethical rules "should" be revealed to appropriate officials. Thus, in our view, the ultimate question facing the inquiring attorney on the facts presented is whether the law of contracts as applied to the confidentiality understanding he agreed to prevents revelation of the violation that occurred to the tribunal in question.

As a matter of its own policy, this Committee does not attempt to render opinions on questions of law,[3] and it does not purport to do so in this case. In particular, we do not address the question whether, as a matter of contract law, the agreement of confidentiality referred to here precludes the inquiring attorney from justifying the time and effort he devoted to this case by informing the tribunal to which his fee application will be presented that a settlement was not achievable because government counsel attached an unethical condition to disposition of the case.

In sum, we conclude that the disciplinary rules are neither a sword nor a shield on the facts presented. Assuming that the confidentiality agreement is otherwise valid, we find no disciplinary rule that compels breach of the agreement. We also find no disciplinary rule that affirmatively prevents disclosure. In our view this inquiry turns on the validity and enforceability of an agreement of confidentiality given the extenuating circumstances presented. Assuming that disclosure is permitted by the law of contracts, we find no ethical bar to disclosing a breach of the disciplinary rules to the tribunal before which the matter in which that breach occurred is pending.

Inquiry No. 83-4-12
Approved September 20, 1983

Opinion No. 131

Canons 4, 5, 7; DR 5-105; DR 4-101; DR 7-101(A)(3); EC 4-5—Simultaneous Representation of Opposing Clients in Separate Proceedings.

Synopsis

Where an attorney represents a class and is approached by an individual who has a claim which is reasonably likely to prejudice or damage a known but unnamed class member in any phase of the class action, the attorney cannot represent the individual.

[3]Rule C-5 of the Rules of the Legal Ethics Committee of the District of Columbia Bar provides that the Committee "will not ordinarily give opinions on questions of law, other than those arising under the Code of Professional Responsibility."

Facts

The inquiring law firm is class counsel to a plaintiff class in an employment discrimination suit against a federal agency. After the class action representation had begun, the firm was also retained in an unrelated action by an individual employee of the same agency who was not a member of the class. The unrelated action seeks the removal or partial deletion of certain performance appraisals in the employee's personnel file. During negotiations with the agency regarding the performance appraisal grievance, the inquiring firm learned that some of the offending appraisals had been prepared by an agency official who is an unnamed class member in the pending class action brought by the inquiring firm. The inquiring firm was only partially successful in the grievance negotiations, and the grievance action must now be litigated in an administrative proceeding. If the administrative action fails, the grievant can seek review in federal court. The firm states that in order for the employee to be successful in the grievance proceeding, he must prove that the appraising officials, including the unnamed class action client, were either biased in their judgment and/or filed inaccurate or falsely prejudicial information.

Discussion

A. *Introduction.*

The inquiring firm has asked the following three questions:

(1) Does our representation of the employee grievant affect our adequacy as counsel to the class and/or our obligation to the appraising official-unnamed class member to the degree that we must withdraw from our representation of the employee grievant?
(2) May we continue our representation of the employee-grievant if we inform the appraising official-unnamed class member of our representation of the employee-grievant and obtain the consent of the appraising official-unnamed class member to our continued representation of the employee-grievant?
(3) May we continue our representation of the employee-grievant if we inform the appraising official-unnamed class member of our representation of the employee-grievant, inform the appraising official-class member that we will not represent her individually during the phase of the class action relating to individual relief, and obtain her consent to continued representation of the employee-grievant?

Because the Committee finds that the firm cannot ethically represent the employer grievant, we do not reach the question whether such representation would affect its adequacy as counsel to the class.[1]

We proceed, then, to answer the inquirer's other questions, and find that the firm cannot continue the dual representation. We note as a preliminary matter that we could find no distinction in the case law or elsewhere to justify treating an unnamed class member as any less a "client" than a named plaintiff or class representative. To the contrary, the law under Fed. R. Civ. P. 23(a) suggests that a special duty is owed to unnamed class members by class counsel, because the unnamed class members are bound by any ruling in the case, even though they may not be actually aware of the proceedings. *See Albertsons, Inc.* v. *Amalgamated Sugar Co.*, 503 F.2d 459 (10th Cir. 1979) (class action certification denied in antitrust action where class members' interests conflicted; court stringently applied requirement of adequate representation because of res judicata affect of class judgments); *Jaurigui* v. *Arizona Board of Regents*, 82 F.R.D. 64, 66 (D. Arizona 1979) ("The question of [counsel's] undivided loyalty directly concerns the adequacy of representation for purposes of maintaining a class action and clearly requires careful consideration and an independent decision by the named plaintiff since unnamed plaintiffs cannot be apprised of the questionable circumstance and decide for themselves whether the law firm representing them should continue to do so."); *In re Fine Paper Antitrust Litigation*, 617 F.2d 22, 27 (3d Cir. 1980) (under Rule 23, a trial judge has a constant duty, as trustee for absent parties in the class litigation who cannot

[1]There are unquestionably cases, however, in which a conflict of interest can render an attorney "inadequate" to represent the class under Fed. R. Civ. P. 23(a). Rule 23(a) requires that, in order for class representatives to protect the class adequately, the representatives must have competent counsel. Counsel cannot be competent if he or she is involved in a conflict of interest. *See e.g., Sullivan* v. *Chase Investment Services of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D. Calif. 1978). (DR 5-105 is violated, and an attorney cannot represent a class of plaintiffs allegedly harmed by fraudulent investment advisory services, where the attorney is involved in parallel securities fraud case as "of counsel" for the plaintiff suing the same defendant sued in the class action. The court found a conflict in such dual representation because only a limited fund of defendant's money existed—insufficient to pay a judgment in *both* cases, a fact which could affect the interest of the class.) *See also Jaurigui* v. *Arizona Board of Regents*, 82 F.R.D. 64, 66 (D. Ariz. 1979) (plaintiff class could not be competently represented by a firm where partner was married to a former government attorney of the defendant governmental body, and a current member of the defendant body); *Kramer* v. *Scientific Control Corp.*, 534 F.2d 1085, 1090 (3d Cir.) *cert. denied*, 429 U.S. 830 (1976) ("a plaintiff class representative could not, with complete fidelity to Canon 9, serve as a class counsel"); *Lowenschuss* v. *C.G. Bludhorn*, 78 F.R.D. 675, 677-78 (S.D.N.Y. 1978) (class counsel was disqualified where his preoccupation with assuring a large attorney's fee evinced a conflict of interest).

challenge the adequacy of the representation, to inquire into the professional competency and behavior of class counsel).

In the instant inquiry, of course, the unnamed class member is known to the firm and, while it has not yet done so, the firm is therefore able to contact, speak with and counsel the class member. In such an instance, there is no justifiable reason for treating her as any less a "client" than a named class member.

B. There is a conflict of interests raised by the proposed multiple representation.

A conflict of interests is presented here because the grievance action could have two related negative effects on the unnamed class member. That is, if the law firm is successful in the grievance action this would amount to a successful attack upon the class member's judgment as a supervisor, as it would show that she was either biased in her judgment or filed performance appraisals containing prejudicial or false information. Moreover, this adverse finding to the appraiser in the grievance proceeding could possibly be later used by the agency in the relief stage of the class action (assuming a positive finding of liability) as a reason to deny her individual relief, such as back pay or a promotion.

DR 5-105, directly guiding the issue of multiple representation, provides that:

> (A) A lawyer shall decline profferred employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

As used in DR 5-105(A) and (B), the term "differing interests" is defined in the Definitions section of the Code as including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." Definitions Section (1). Therefore, an attorney cannot represent multiple clients whose interests adversely affect the loyalty of a lawyer to his client.

The present inquiry thus falls squarely within the prohibitions of DR 5-105(B). The two clients clearly have differing interests; the unnamed class member in maintaining her status as a good employee, and the grievant in attacking the class member's judgment.

C. The conflict cannot be waived.

Having been notified of the multiple representation, the employee-grievant nonetheless wishes the inquiring firm to continue representing her. The firm has not notified the appraising official of the conflict of interest; neither has it sought or obtained any information—confidential or otherwise—from her during the class action. The Committee nonetheless finds that the conflict cannot be waived, because it is not clear under DR 5-105(C) that the representation accorded both clients if the dual representation continues would be "adequate."

As this Committee has previously noted, DR 5-105(C) contains two elements which must be satisfied before multiple representation may be continued: (1) *Both* clients must consent after full disclosure of the possible effect of the representation on the attorney's independent professional judgment on behalf of *each* client; and (2) it must be "obvious" that the lawyer can adequately represent both clients. *See* Opinion Nos. 49, 54, 92, and 94. Pursuant to the latter requirement, the lawyer must believe that "the representation *will be adequate* to the purposes of the clients in the light of the understanding of the client's consent to the dual representation after the disclosure to each client of how the duality of the representation will affect the lawyer's performance." Opinion No. 49 (emphasis supplied). *See also* Opinion No. 94.

Therefore, even if it is assumed that the unnamed class member would consent to the dual representation, we must determine whether "it is obvious" that the inquiring firm "can adequately represent" each client's interests. In Opinion No. 49, dealing with the propriety of drafting agreements for two different corporations in the same transaction, this Committee interpreted the meaning of "obvious adequate representation." We stated that:

> Unless DR 5-105(C) was drafted to be a nullity, this must mean that "adequately represent" in the first part of DR 5-105(C) means something other than to represent with unimpaired professional judgment. What it has to mean is that the representation will be adequate to the purposes of the clients in the light of the understanding of the nature of the representation that is necessarily implied by each client's consent to the dual representation after the disclosure to each client of how the duality of the representation will affect the lawyer's performance.

In answering the difficult question whether dual representation would be "adequate to the purposes of the clients in the light of the understanding of the nature of the representation," this Committee drew a line between counseling situations—as was then before us in Opinion 49—and litigation, as is presented here. In the inquiry before us in Opinion 49, the Committee found that:

> The lawyer as advocate is almost certainly less free than the lawyer as adviser to represent clients whose interests conflict, even with their consent. Indeed, EC 5-15 says that "[a] lawyer should never represent in litigation clients with different interests. . . ."

Thus, this Committee has sounded a note of caution where "the nature of the representation" is litigation.

The American Bar Association has similarly found that multiple representation in litigation may not be acceptable, even if the clients consent, where the representation is of opposing parties or potentially adverse dependents in separate suits involving the same matter. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1433 (1978) (municipal corporation and defendant civil service commission in same case); *Id.* Informal Op. 1199 (1971) (law firm representing two civil defendants in separate but related suits where counsel given to one defendant might adversely affect the interests of the other).

Although the present inquiry does not involve multiple representation of opposing parties in the *same* case, or different parties in separate suits regarding the same matter we nevertheless conclude that it is not obvious that the inquirer can adequately represent both clients in this litigation context with unimpaired professional judgment.

The reason for this is, as noted above, the very real possibility that in representing the employee-grievant, the firm might (indeed, should) be reluctant to do what is necessary to succeed; that is, attack the judgment and actions of one of its clients, the unnamed class member.

A further concern influenced our decision that it is not obvious that adequate representation would be afforded both clients if the dual representation were continued. That consideration is the likelihood that disclosures of confidential information might be made by the firm in violation of Canon 4. Although the inquiring firm states that it has sought no information from the appraising official/class member we assume, however, that the employee/grievant has disclosed "confidences and secrets" in the course of his relationship with the firm. Ethical Consideration 4-5 cautions against acceptance of representation by a lawyer that could require the "disclosure of confidences and secrets of one client to another."

In the instant case there is a very real danger that the inquiring firm may mak disclosures of confidences of the employee grievant in the course of representing the ap praising official with respect to individua relief for her in the class action. A defense of the appraising official's prior employment

record might require, for example, that the inquiring firm negate any inference concerning inadequate employee appraisals prepared by the official and this could involve disclosures of "secrets and confidences" entrusted to the firm by the grievant.

Although the grievant could consent to disclosure of confidential information,[2] the grievant would have little incentive to do so. Therefore, the specter of consent is remote enough so that it is not obvious that adequate representation, within the meaning of DR 5-105, would be afforded both individuals.

For this reason, we decide that the firm's representation of the employee-grievant would affect its obligation to the appraising official-unnamed class member to the degree that it must withdraw from the representation of the grievant, even if the unnamed class member consented to the dual representation.

D. The firm cannot ask the unnamed class member to seek individual representation.

The inquiring firm asks whether it may continue to represent the employee-grievant (and the class) if the unnamed class member agrees to end the conflict of interest by obtaining independent counsel to represent her individually as a named plaintiff in the suit. The Committee decides that the firm may not even seek the class member's consent to such a scheme, because to do so would violate Canon 7.

DR 7-101(A)(3) states that:

> (A) A lawyer shall not intentionally:
> (3) Prejudice or damage his client during the course of the professional relationship....

The Committee finds that this Disciplinary Rule would be violated if the unnamed class member is required to shoulder the burden of securing independent counsel to represent her in a suit in which all other class members are the beneficiaries of the firm's representation, and where there are no offsetting benefits to be gained from independent representation. In addition to the obvious costs involved, the burdens in obtaining independent counsel would include the virtually unavoidable additional participation and time and trouble that the unnamed class member would incur as a result of being specifically indentifiable in the suit. She might even become a discovery target as a result of the new-found status as a named plaintiff.

Therefore, while we do not hold that DR 7-101(A)(3) may never be waived by a client, under the facts of this case the burden upon the unnamed class member would simply be too great to justify the independent counsel scheme proposed by the inquiring firm; it is inherently prejudicial for the unnamed class member even to be asked to forego her status as an anonymous beneficiary of the class action in favor of the costs inherent in the status of a named and independently-represented plaintiff.

For this reason, the Committee decides lastly that the firm may not continue to represent the employee-grievant by asking the unnamed class member to obtain her own lawyer.

Inquiry No. 83-2-3
November 15, 1983

Opinion No. 132

Attorney as Witness

• A lawyer need not withdraw from representing a client where a former member of his firm may be called as a witness to the prejudice of his client unless the relationship between the attorneys is such that the client's lawyer is not free of compromising influences and loyalties.

Applicable Code Provision

• **DR 5-102(B)** (Withdrawal of Counsel When Lawyer Becomes a Witness)

Inquiry

The inquirer is an attorney with a legal services program. His client proceeds In Forma Pauperis in a pending federal case that initially was handled by another attorney who is no longer with the program. However, because former counsel was not a member of the federal bar, inquirer has signed all the pleadings.

Former counsel interviewed the client concerning her desire to proceed IFP, and she subsequently filed an affidavit seeking IFP status. In that affidavit, the client stated that her sole income source was a $236 per month AFDC payment. However, in a subsequent deposition, the client's sister testified that the client was earning an additional $100 per month through part time employment. When confronted by inquirer with his testimony, the client did not deny earning the additional money, but stated that she had informed former counsel about this income and that he had advised her that including this fact in her affidavit was unnecessary. Former counsel, however, denies that the client ever mentioned the additional income to him.

Inquirer believes that former counsel will be called as a witness by defendant for impeachment purposes. It also appears that the client wishes inquirer to continue as her counsel. Inquirer asks whether he must withdraw from the case because the testimony of a former firm member may be prejudicial.

Discussion

A Lawyer Need Not Withdraw From Representing A Client Where An Attorney Formerly In His Firm May be Called As A Witness To The Prejudice Of His Client Unless The Relationship Between The Attorneys Is Such That The Client's Lawyer Is Not Free Of Compromising Influences And Loyalties

Ethical Consideration 5-1 advises that the "professional judgment of a lawyer should be exercised...solely for the benefit of his client and free of compromising influences and loyalties." To this end, DR 5-102 provides:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

As footnote 31 to this rule explains, the rule's object is to "avoid putting a lawyer in the obviously embarrassing predicament of testifying and then having to argue the credibility and effect of his own testimony." DR 5-102(B) note 31 (quoting *Galarowicz* v. *Ward,* 230 P.2d 576 (Utah 1051)). Case law involving DR 5-102(B) demonstrates that the rule seeks to protect the client whose best interest is to attack the credibility of a lawyer-witness. *Freeman* v. *Kulicke & Soffa Industries, Inc.* 449 F. Supp. 974 (E.D. Pa. 1978). *See also Kroundgold* v. Thiester, 521 F.2d 763 (3d Cir. 1975); *Rice* v. *Baron*, 456 F. Supp. 1361 (S.D.N.Y. 1978); *Cottonwood Estates* v. *Paradise Builders,* 624 P.2d 296 (Ariz. 1981).

Most cases dealing with DR 5-102(B) focus on the degree to which testimony by the client's lawyer or firm member is in fact prejudicial and material to a determination of the issues litigated. Here the former firm member's testimony apparently would be prejudicial and, if former counsel still were employed by inquirer's office, the disciplinary rule would force inquirer to withdraw.

The attorney-witness, however, *no longer is a member* of inquirer's firm, and the question thus is whether his departure removes the situation from the rule's coverage. Literally it would appear to do so. Nonetheless, we believe the rule should be interpreted to apply to the situation where a former firm member is called to testify against a firm's client if the relationship between the client's lawyer and the former firm member is such that the client's lawyer is not "free of compromising influences and loyalties." *See* EC 5-1. In other words, if the relationship is such that inquirer cannot effectively cross-examine his former associate about that attorney's adverse testimony, inquirer should withdraw from representation.

Relevant here is DR 5-101(A), which provides that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not

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[2]DR 4-101(B) and (C) provide, in pertinent parts, that:

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:
(1)Reveal a confidence or secret of his client.
(2) Use a confidence or secret of his client to the disadvantage of the client.
(3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.
(C) A lawyer may reveal:
(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own ...business... or personal interests" (emphasis added). If a lawyer may not accept employment where his professional judgment likely will be affected by his own business or personal interests, it is reasonable to conclude that he should not continue in a case where his ability to cross-examine a former firm member similarly will be affected by such interests. *See further* EC 5-10, which provides: "Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations."

On the facts presented to the Committee, we cannot conclude that the relationship involved presents a danger. We thus find that withdrawal because of former counsel's potentially adverse testimony is not required by DR 5-102(B).

The fact that inquirer signed both the complaint and the motion to proceed IFP raises other considerations. At the time the documents were prepared, Rule 11, Federal Rules of Civil Procedure, declared:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.[1]

Conceivably, inquirer might be made a witness to explain his signatures, and defendant might adduce from him testimony adverse to his client's interests. This possibility, however, seems somewhat remote and withdrawal is not required by the facts that now appear.

In reaching the above conclusions, we find it significant that the client is fully informed that former counsel likely will testify against her, but nonetheless has asked inquirer and his firm to continue the representation.[2] It thus appears in the client's best interest for inquirer to proceed, and in this situation withdrawal is not a favored solution. *Cf.* DR 2-110; DR 5-102(A); EC 2-32.

Finally, we note that the aspiration reflected in Canon 9, EC 9-6 and DR 9-101 that a lawyer should avoid even the appearance of professional impropriety does not demand or counsel withdrawal in the circumstances presented. DR 9-101 plainly is not violated by continued representation in this case. More generally, we do not believe that impropriety would appear if inquirer continues his role as counsel. To recapitulate, former counsel is no longer in inquirer's office, inquirer himself likely will not be a witness, and the client wishes inquirer to continue as counsel. We do not believe that inquirer's continued representation will lessen the public's faith or confidence in the legal system or the legal profession. *Cf.* EC 9-1, 9-2.

Inquiry No. 83-5-15
December 13, 1983

Opinion No. 133

Private Practice by a District of Columbia Hearing Examiner

• An attorney who engages in private practice in addition to being employed by the District of Columbia generally may not represent his private clients in cases involving the District unless (1) the matter is entirely unrelated to the activities of his agency; (2) he obtains the consent of the client after full disclosure of the possible impairment of his independent judgment; (3) he informs the client that his employment does not afford him any special advantages and he does not seek any such advantages; and (4) he complies with all applicable regulations and statutes.

Applicable Code Provisions

• **DR 5-101(A)** (Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment)

• **DR 8-101** (Action as a Public Officer)

• **DR 9-101** (Avoiding Impropriety or the Appearance of Impropriety)

• **EC 5-1**

• **EC 5-15**

• **EC 8-8**

Inquiry

Inquirer is employed full time by the District of Columbia Department of Transportation as a hearing examiner for traffic and parking tickets. He also maintains a small private legal practice unrelated to his duties at the Department of Transportation. However, the District of Columbia is a party in three cases he is handling on behalf of his private clients. In one case, he represents a District teacher who is a co-defendant with the District. In a second case, he represents the defendant in a paternity suit in which corporation counsel represents the plaintiff. Finally, he represents the plaintiff against the District (and other defendants) in a case arising from an allegedly wrongful towing. At the suggestion of his supervisor and corporation counsel, inquirer asks the Committee whether his participation in these cases is ethically permissible.

Discussion

The inquiry raises two issues. The first is whether inquirer's employment by the District reasonably may affect the exercise of his professional judgment on behalf of his private clients. The Committee believes that it may in at least the third case listed above, and that inquirer should not undertake that case except with the consent of his private client after full disclosure of the potential conflict. The second is whether inquirer's private practice creates an appearance of impropriety. The Committee believes that, on the facts given, it does not.

I. Conflict of Interest

Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client. As EC 5-1 explains:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his clients and free from compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client. (footnote omitted)

Disciplinary Rule 5-101(A) provides that absent consent of the client after full disclosure, an attorney may not represent a client if the exercise of his professional judgment on behalf of the client "will be or reasonably may be affected by his own financial, business, property, or personal interests."

Here, because inquirer is employed by the District, the question is whether that employment "will or reasonably may" interfere with his independent professional judgment on behalf of his private clients. The Committee believes that the likelihood of such interference cannot be disregarded. Indeed, we noted in Opinion No. 51 that where an attorney filed suit on behalf of a client against the attorney's part-time employer, the exercise of independent judgment on behalf of the client would be "most unlikely" and "the dilution of loyalty" to the client would be "almost inevitable." Here, the likelihood of impaired professional judgment is heightened

[1] Rule 11 was amended and strengthened as of August 1, 1983, and now reads in pertinent part:

> The signature of an attorney...constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry *it is well grounded in fact* and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harrass or to cause unnecessary delay or needless increase in the cost of litigation. (emphasis added)

[2] Apparently, the client also has been asked to sign a waiver of conflict.

because inquirer is employed full time by the District (taking annual leave to engage in his private practice), and his income from his private practice is negligible.

The extent to which inquirer's independent professional judgment will be affected by his employment with the District depends on whether and to what extent the interests of the District differ from those of his private clients. For example, the District's involvement as a party on the same side of the case as inquirer's client is less likely to affect his judgment on behalf of his client than is the District's involvement as an opposing party. However, even when the parties are formally on the same side of the case, there may be actual or potential cross-claims or conflicting litigation strategies. It is necessary in each case, therefore, to look behind the formal designations of the parties and to determine on the facts involved in each case whether a conflict may arise.

Turning to the specific cases described in the inquiry, the Committee believes that inquirer's employment by the District of Columbia reasonably may have an adverse effect on his exercise of independent professional judgment in the case in which his client is suing the District over the towing incident. DR 5-101(A) permits him to continue to represent the client in that matter, however, if he obtains the client's consent after fully disclosing his employment as a hearing examiner and explaining the possible consequences of that employment on his independent professional judgment. The explanation also should stress that employment by the District does not afford any special advantage or influence in cases involving the District. *See* DR 8-101(A)(2); DR 9-101(A); Opinion 92. If inquirer does not obtain such informed consent, he must either withdraw from the case or resign his position as a hearing examiner.

On the facts given, we cannot decide whether inquirer's other cases would create a similar conflict, and it is therefore up to inquirer to determine on a case-by-case basis whether the interests of his client and of the District differ to the point that his independent professional judgment reasonably may be affected. If so, before continuing his representation, inquirer must seek the informed consent of the client as described above. If he is uncertain as to whether his independent judgment may be affected, the prudent course would be to make full disclosure to the client and to seek consent. *See* EC 5-15.

With respect to inquirer's obligations to the District of Columbia—as distinguished from his obligations to his private clients—there does not appear to be an attorney/client relationship between inquirer and the District. Inquirer does not represent the District in the sense of advising it or acting as its advocate. Rather, he acts in a quasi-judicial capacity, conducting hearings on which the District bears the burden of proof. 40 D.C. Code §§ 616, 626 (1981 ed.). Inquirer does not represent the interests of the District at these hearings—indeed, he finds against the District when warranted. Because of the absence of the attorney/client relationship, inquirer is not obligated under Canon 5 (including its disciplinary rules and ethical considerations) to obtain the District's consent to his representation of private litigants in cases involving the District. However, inquirer is clearly subject to the statutes and regulations governing the conduct of employees of the District. Furthermore, DR 8-101(A) requires that "[a] lawyer who holds public office shall not. . . [u]se his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client."

II. Possible Appearance Of Impropriety

Inquirer's representation of clients in cases in which the District of Columbia is a party or has an interest raises at least two possible appearance-of-impropriety problems. The first is the propriety of inquirer's engaging in a private legal practice at all. As a hearing examiner, inquirer acts in a quasi-judicial capacity. The Code of Judicial Conduct provides that judges "should not practice law." Code of Judicial Conduct, Canon 5-F. However, the Code of Judicial Conduct applies only to those who are "officer(s) of a judicial system performing judicial functions. . . ." Code of Judicial Conduct, *Compliance with the Code of Judicial Conduct.* Inquirer is not an officer of a judicial system as we understand the phrase. Rather, he is employed by an administrative agency, and for this reason, it appears that the Code of Judicial Conduct is inapplicable. Nevertheless, inquirer is subject to DR 8-101 of the Code of Professional Responsibility.

The Committee finds that no unacceptable appearance of impropriety is created by inquirer's practice of law in areas unrelated to his official duties, provided that he complies with the conditions set forth below. In Opinion 48, we determined that a member of the District of Columbia Human Rights Commission—a quasi-judicial body responsible for hearing discrimination cases—could engage in the private practice of law. Although the Board position involved there was an unpaid one, Opinion 48 suggests that it is not inherently improper for a quasi-judicial administrative officer to practice law before tribunals other than that on which he sits. *See* EC 8-8. Moreover, in the District of Columbia, members of the District of Columbia Council, other than the Chairman, are permitted to practice law before the courts of the District. D.C. Code § 1-146(h). Given these boundaries, there is no inherent appearance of impropriety in the practice of law by one holding the relatively low visibility position of traffic and parking hearing examiner.

Finally, the fact that inquirer represents clients in cases in which the District of Columbia is a party or has an interest does not necessarily create an appearance of impropriety. For example, in Opinion 92 we stated that although serious appearance of impropriety problems would exist if a volunteer attorney for the District represented an agency that he or she was simultaneously suing in private practice, "[t]here is little likelihood that serious public objection would result if a participating attorney were representing the Zoning Commission in a contract dispute at the same time that he or she was prosecuting an appeal from a Public Service Commission ruling." Here, the Committee believes that no unacceptable appearance of impropriety would arise from inquirer's representation of private clients in cases involving the District if each of the following conditions were satisfied:

(1) The subject matter of the case is entirely unrelated to any activity of the Department of Transportation;

(2) Inquirer informs his client that his employment with the District does not afford him any special influence or advantage in cases involving the District;

(3) Inquirer is not in violation of any statute or regulation relating to employment by the District of Columbia; and

(4) Inquirer does not use his position with the District of Columbia to obtain access to documents or other information to which he would not have access as an outside private practitioner.

Inquiry No. 83-3-6

Adopted February 21, 1984

Opinion No. 134

Advertising and Soliciation

• A law firm ethically may send newsletters to clients and other members of the public provided that such newsletters are consistent with the Disciplinary Rules governing publicity, advertising and solicitation. DR's 2-101, 2-103.

• If the newsletters are sent to jurisdictions where members of the firm practice law or are members of the bar, the newsletters must also conform to the restrictions on advertising and solicitation in that jurisdiction. DR 3-101(B).

Applicable Code Provisions

• **DR 2-101** (Publicity and Advertising)
• **DR 2-103** (Solicitation of Professional Employment)
• **DR 3-101(B)** (Lawyers Practicing Law In Another Jurisdiction Must Observe the Disciplinary Rules Of That Jurisdiction)
• **EC 2-1**
• **EC 2-2**

Inquiry

A member of the bar has asked what ethical considerations must be taken into account when a law firm prepares a newsletter. More specifically, he has asked: (1) what is the acceptable format of a firm newsletter; (2) can firm letterhead stationery be used; (3) are there limitations on the subjects included in the newsletter; (4) can comments from recipients be included; (5) may a newsletter be sent to potential as well as current clients of the firm; (6) are the ethical considerations any different if a newsletter is prepared by a law firm but distributed by another organization; and (7) are there multi-jurisdictional issues to be considered if the newsletter is sent to recipients in various states.

Discussion

The Committee is aware that law firm newsletters are used by a substantial number of firms in this jurisdiction and that their use is increasing. There is nothing inherently unethical about such newsletters, and indeed, as discussed below, they may well serve interests identified in the aspirational Ethical Considerations of the Code of Professional Responsibility. However, the Disciplinary Rules also place certain constraints on the public communications of lawyers, and these must be observed in the preparation and distribution of newsletters.[1]

At the outset we note that the Ethical Considerations in the Code encourage lawyers to inform the public about legal issues, and newsletters are an effective means of accomplishing this goal. EC 2-1 provides:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laypersons to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. (footnotes omitted)

EC 2-2 enumerates ways in which lawyers can accomplish the goals set out in EC 2-1. Although newsletters are not specifically mentioned in EC 2-2, they are clearly within the range of activities suggested:

> [L]awyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs should be motivated by a desire to benefit the public in its awareness of legal needs and selection of the most appropriate counsel rather than to obtain publicity for particular lawyers. (footnote omitted)

While newsletters perform a valuable educational function, it is also apparent that law firms publish them in order to service current clients and to attract new ones. In short, there is a strong—and probably predominant—business incentive involved in the publication of newsletters. Consequently, the Disciplinary Rules governing advertising and solicitation are implicated when a law firm publishes a newsletter.

DR 2-101(A), the rule on publicity and advertising, provides:

> A lawyer shall not knowingly make any representation about his or her ability, background, or experience or that of the lawyer's partner or associate, or about the fee or any other aspect of a proposed professional engagement, that is false, fradulent, misleading, or deceptive, and that might reasonably be expected to induce reliance by a member of the public.

To the extent that a newsletter expressly or implicitly conveys information about a lawyer's "ability, background, or experience"—as many do—this rule applies.

DR 2-103(A), the rule on solicitation, provides in pertinent part:

> A lawyer shall not seek by in-person contact, or through an intermediary, his or her employment (or employment of a partner or associate) by a non-lawyer who has not sought his or her advice regarding employment of a lawyer, if:
> (1) The solicitation involves use of a statement or claim that is false, fradulent, misleading, or deceptive within the meaning of DR 2-101(B). . . .

Since newsletters often are intended to develop business for a firm, this rule also applies.

The key restriction on advertising and solicitation in both of these rules is the prohibition against statements that are "false, fraudulent, misleading, or deceptive." These terms are in turn defined, although not exhaustively, in DR 2-101(B):

> Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:
> (1) Contains a material misrepresentation of fact;
> (2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
> (3) Is intended or is likely to create an unjustified expectation;
> (4) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
> (5) [provisions relating to fees omitted]
> (6) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

DR 2-101(C) contains further restrictions on the content of public communications and it is this provision which probably places the most specific restrictions on the contents of a newsletter:

> A lawyer shall not, on his or her own behalf, or on behalf of a partner or associate, or any other lawyer affiliated with the firm, use or participate in the use of any form of public communication which:
> (1) Contains statistical data or other information based on past performance or prediction of future success;
> (2) Contains a testimonial about or endorsement of a lawyer;
> (3) Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal service

[1]These constraints may be subject to challenge under the First Amendment. Unless a specific provision of the Code has been squarely held unconstitutional by the Supreme Court or a court in this jurisdiction, this Committee is obliged to interpret the Code as it has been adopted by the District of Columbia Court of Appeals, and accordingly we take no position on the constitutional issues raised by a lawyer's public communications.

which is not susceptible of reasonable verification by the public;

(4) Is intended or is likely to attract clients by use of showmanship or self-laudation.

The foregoing provisions provide the basis for the answers to most of the inquirer's questions. It is difficult to conceive of a format that itself would violate DR 2-101(A) or DR 2-103(A), and certainly the use of a firm's letterhead stationery would not constitute a violation. We do not believe that these disciplinary rules impose any restrictions on the subjects discussed in a newsletter so long as the discussion is not false, fraudulent, misleading, or deceptive, or contrary to the prohibitions contained in DR 2-101(C). Comments from newsletter recipients are permissible provided that they do not run afoul of these prohibitions, particularly DR 2-101(C)(2) which bars testimonials about and endorsements of lawyers. Moreover, the Disciplinary Rules do not restrict the distribution of newsletters to potential clients to any greater extent than to current clients.

Since DR 2-103(A) deals with solicitation through intermediaries as well as direct contacts, the ethical considerations are no different if the newsletter is prepared by a law firm but distributed by another organization. Also relevant in this regard is DR 2-103(B) which provides:

> A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of his or her services or those of his or her partner, or associate, or any other lawyer affiliated with him or her or his or her firm, as private practitioner, if:
>
> (1) The promotional activity involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulation contained in DR 2-101(C); or
>
> (2) The promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.

The final question is whether there are multi-jurisdictional issues to be considered if the newsletter is sent to recipients in various states. DR 3-101(B) requires that "A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." In Opinion 105 we recognized that forms of advertising which are acceptable in this jurisdiction might not be acceptable in others. However, that opinion also concluded that advertising alone does not constitute the practice of law. "Therefore, the provisions of DR 3-101(B) of the D.C. Code would not be violated even were the advertisements to constitute a violation of another jurisdiction's requirements." *Id.* Of course, another jurisdiction might reach a contrary conclusion that distribution of advertising there does constitute the practice of law. Furthermore, if the law firm or its members actually practice law or are members of the bar in jurisdictions to which newsletters are sent, DR 3-101(B) would be applicable, and the newsletter would have to conform to the requirements of the recipient jurisdictions. In this regard, we note that the rules governing advertising and solicitation in the District of Columbia are different from those in many other jurisdictions.

Inquiry No. 84-1-2
Adopted April 17, 1984

Opinion No. 135

Withdrawal From Employment

• A lawyer who leaves private practice to take employment as an in-house counsel must: (1) take reasonable steps to avoid forseeable prejudice to his clients by either completing their cases or allowing sufficient time for the employment of other counsel; (2) comply with the rules of any tribunal before which his cases are pending; and (3) refund any part of a fee paid in advance which has not been earned. DR 2-110(A).

Practice of Law With A Corporation Whose Directors Or Officers Are Non-Lawyers

• A lawyer employed by a corporation whose directors and officers are non-lawyers can perform legal work for the corporation's clients only if (1) the fees generated by the legal work do not compensate or profit any of the non-lawyers other than the non-lawyers who work under the lawyer's supervision to perform the legal services, and (2) the non-lawyers do not exercise any control or influence over the lawyer's professional judgment. DR's 3-101(A), 3-102, 3-103, and 5-107.

Advertising and Solicitation

• A lawyer employed by a corporation may urge others to use the corporation's legal services if he follows the restrictions imposed by the rules on advertising and solicitation. DR's 2-101 and 2-103. When he urges others to use the corporation's non-legal services these rules do not apply.

Dishonesty, Fraud, Deceit, and Misrepresentation

• A lawyer may not bill a client for services performed by another and represent to the client that the bill represents the attorney's own efforts. DR 1-102(A)(4).

Applicable Code Provisions

• **DR 1-102(A)(4)** (A Lawyer Shall Not Engage in Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation)
• **DR 2-101(C)** (Restrictions on a Lawyer's Public Communications)
• **DR 2-103** (Lawyer May Solicit Professional Employment Subject to Certain Restrictions)
• **DR 2-110** (Lawyers May Withdraw from Employment Under Certain Conditions)
• **DR 3-101(A)** (A Lawyer Shall Not Aid a Non-lawyer in Unauthorized Practice of Law)
• **DR 3-102** (A Lawyer Shall Not Share Legal Fees with a Non-lawyer)
• **DR 3-103** (A Lawyer Shall Not Form a Partnership with a Non-lawyer Which Includes the Practice of Law)
• **DR 5-107(B)** (A Lawyer Shall Not Permit One Who Employs the Lawyer to Render Legal Services For Another to Direct or Regulate the Lawyers Professional Judgment in Rendering Such Services)
• **DR 5-107(C)** (A Lawyer Shall Not Practice Law With or In the Form of a For-Profit Professional Corporation or Association if a Non-lawyer (1) Owns Any Interest Therein, (2) is a Corporate Director or Officer Thereof; or (3) Has the Right to Direct or Control the Professional Judgment of the Lawyer.)

Inquiry

The inquirer has recently left private practice to become the sole in-house attorney for a District of Columbia corporation which is involved in the legal and actuarial aspects of pension and profit-sharing plan administration. He describes his duties as follows: preparation of pension and profit-sharing plans for the corporation's clients, preparation and filing of IRS forms for approval of the plans, preparation and filing of annual reports, and furnishing general pension advice to the corporation's clients and their attorneys. The inquirer has submitted several questions to this Committee which can be summarized as follows:

1. In order to wind up his current practice, the inquirer will notify all clients with

active cases of his change in employment and give them the option of having him complete their cases or finding new counsel. He will also notify all appropriate courts, agencies, bar associations, and opposing counsel of his change of address. He asks whether any other action on his part is mandated?

2. Can he perform legal work for the corporation?

3. Can he perform legal work for the corporation's clients or the clients' own counsel, such as drafting and filing incorporation papers, preparing pension plans, and advising on pension law?

4. Can he approach unrepresented individuals, attorneys, and CPA's to urge them to use the corporation's services?

5. When the corporation provides services to a client through the client's attorney, the corporation bills the attorney rather than the client. Is it proper for the corporation to bill the attorney and to receive payment from the attorney if (a) the attorney specifically informs the client of the nature and amount of the coproration's bill; or (b) the attorney does not so inform the client, but rather represents to the client that the bill is for the attorney's own efforts?

Discussion

Some of the questions posed by the inquirer are quite simple and others are rather complex. At the outset, it appears that the inquirer's withdrawal from his current cases presents no ethical problem. DR 2-110(A)(2) provides that "a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client...." *See* Opinions 103, 59, 48. Since the inquirer is prepared to complete the cases of his current clients, he plainly is in compliance with this rule. If it were necessary for him to drop any of his cases before their completion, DR 2-110(A)(2) requires that he allow the client sufficient time to employ other counsel. DR 2-110(A)(1) provides that a lawyer may not withdraw from a matter before a tribunal unless he complies with any requirements which the tribunal might require. Although the inquirer has notified appropriate courts and agencies, he should take care that he has also complied with any additional rules those bodies might impose. With respect to whether any additional action is required for the inquirer to wind up his private practice, we note that DR 2-110(A)(3) provides that "[a] lawyer who withdraws from employment shall promptly refund any part of a fee paid in advance that has not been earned." *See generally* Opinion 113.

With respect to the inquirer's activities on behalf of his new employer, there plainly is no prohibition on an in-house lawyer performing legal work for the corporation that employs him. However, with respect to his legal work performed for the corporation's clients, there are a number of problems presented by the fact that he is employed by a for-profit corporation whose directors and officers are non-lawyers. In Opinion 93, we discussed the interaction between DR 3-101(A), DR 3-102, DR 3-103, and DR 5-107, and concluded that:

> ... they reinforce each other and, taken together, present a clear and coherent pattern of restrictions on collaboration between lawyers and non-lawyers. That pattern may be comprehensively traced as follows:
>
> (1) The services to be provided by non-lawyers must be non-legal services; or, if they are legal services, then they must be performed under the supervision of a lawyer, and must not include any activities that would be ethically impermissible if performed directly by a lawyer.
>
> (2) The non-lawyers involved in the enterprise must not direct or regulate the exercise of the professional judgment of lawyers in the performance of legal services.
>
> (3) The non-lawyers must not share in fees paid for legal services, though they may receive fees for non-legal services performed by them.
>
> (4) As respect to the form of the enterprise, reflecting requirements (2) and (3), just described, legal services must not be performed by a partnership which includes both lawyers and non-lawyers or by a corporation in which non-lawyers have the power to direct the performance of legal services, or to profit from them.

Under this analysis, the inquirer may perform legal work for the corporation's clients only under the following circumstances: (1) the fees generated by that work may go only to compensate the inquirer and whatever lay staff works under his supervision to perform the legal work; such fees may not be used to compensate or profit any of the non-lawyers involved in the corporation; and (2) the non-lawyers involved in the corporation must not exercise any control or influence over the exercise of the inquirer's professional judgment in performing legal services for the corporation's clients.

The inquirer's question about urging prospective clients to use the corporation's services falls into two parts. Insofar as he urges use of the corporation's legal services, he may do so provided that he observes the restrictions on publicity, advertising and solicitation contained in DR 2-103. Insofar as he urges use of the corporation's non-legal services, those rules would not apply. Although we hope that the inquirer would not feel free to make any "false, fraudulent, misleading, or deceptive" statements in urging use of the non-legal services, *see* DR 2-101(A), DR 2-103(A)(1), he would be free to use forms of conventional advertising which lawyers are barred from using by DR 2-101(C).

The inquirer's last question is truly alarming. He apparently contemplates situations in which the corporation will provide services to a party through that party's attorney and will bill the attorney, but the attorney will represent to the client that the bill is for the attorney's own efforts without revealing the role of the corporation. DR 1-102(A)(4) flatly prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Since it would be improper for the contracting attorney to misrepresent the bill, it also would be improper for the inquirer knowingly to benefit from such conduct. On the other hand, no problem is raised if the corporation bills an attorney who in turn bills a client with full disclosure of how the bill was incurred.

Inquiry No. 84-1-3

Adopted April 17, 1984

Opinion No. 136

Multiple Representation

• Where an attorney represents a police officer in a probate matter and is asked by another individual to represent him in defending a tort action arising from an automobile accident as to which the officer-client is the investigating official, the attorney may represent the individual provided that both the officer and the would-be client consent. The attorney is not required by the Disciplinary Code to inform the court or opposing counsel that the police officer is a client in a non-related matter.

Applicable Code Provision

• **DR 5-105(A) and (C)** (Refusing to Accept Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer)

Inquiry

The inquiring attorney has been asked to represent a defendant in an automobile accident tort action. The accident, which

occurred in the District of Columbia, was investigated by a D.C. police officer, who did not witness the accident. That officer is inquirer's client regarding a death claim (now resolved) and a related pending probate matter.

The police report states that both drivers were ticketed for "failure to pay attention." However, the box labeled "Contributing circumstances" states "no violation" for the would-be client and "driver inattention" for the other party. Hence, inquirer may use the police officer as a witness. In any case, the officer likely would not be subject to "any especially probing cross-examination" by inquirer. The would-be client knows that inquirer represents the officer.

Inquirer asks two questions:

(1) May he represent the would-be client?
(2) If so, is he obligated to inform anyone that he represents the police officer?

Discussion

1. A Lawyer May Represent Multiple Clients If It Is Obvious That He Can Adequately Represent The Interests Of Each And If Each Consents To The Representation After Full Disclosure

EC 5-14 provides that "[m]aintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client." Moreover, EC 5-15 states that "a lawyer should never represent in litigation multiple clients with differing interests."

These proscriptions are reflected, at least in part, in DR 5-105(A), which reads:

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

See also DR 5-105(B). The term "differing interests" is defined to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest." Definitions ¶ 1.

As its test indicates, even in the circumstances enumerated in DR 5-105(A), a lawyer may accept representation if it is allowed under DR 5-105(C), which states:

> In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

There is an apparent contradiction between DR 5-105(A) and DR 5-105(C). How can it be "obvious" that a lawyer "can adequately represent" the interest of each client "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment"? This Committee has wrestled with this problem in the past. In Opinion 49, we said:

> In the consent provision of DR 5-105(C) can be found the makings of a formula for reconciling DR 5-105(A) and DR 5-105(C). The requirement of DR 5-105(C) is that each client consent "after full disclosure of the effect of" the dual representation "on the exercise of" the lawyer's "independent professional judgment on behalf of each." It is assumed, in other words, that consent may be given even though, to the knowledge of the client, the exercise of the lawyer's independent professional judgment may be impaired; it is assumed that it is not obvious that the exercise of his judgment will not be impaired. Unless DR 5-105(C) was deliberately drafted to be a nullity, this must mean that "adequately represent" in the first part of DR 5-105(C), means something other than to represent with unimpaired professional judgment. What it has to mean is that the representation will be adequate to the purposes of the clients in the light of the understanding of the nature of the representation that is necesarily implied by each client's consent to the dual representation after the disclosure to each client of how the duality of the representation will affect the lawyer's performance.

See also, in the same vein, Opinions 54, 92, 94, 106 and 131.

The American Bar Association Committee on Legal Ethics has made similar rulings. That Committee has indicated that a lawyer, who acts as counsel to both parties, may draft a contract between two municipalities (Informal Opinion No. 518) or a loan agreement between a bank and a borrower (Informal Opinion No. 643) if the disclosure and consent requirements of DR 5-105(C) are met.

The present inquiry presents a circumstance different from the type of situation with which the Code is primarily concerned. As EC 5-17 says, "[t]ypically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent." Here, the possible "differing interests" stem from the fact that a likely trial witness is a client of the lawyer; a co-plaintiff or co-defendant situation is not involved.

Nonetheless, the same basic analysis applies. If inquirer's professional judgment will or is likely to be adversely affected by the new assignment, or if that assignment likely will involve inquirer's representing differing interests, he may represent the would-be client *only* if (1) both clients consent after full disclosure of the possible adverse effects on inquirer's independent professional judgment, and (2) it is "obvious" that inquirer adequately can do for each client what that client expects him to do. *See* Opinion Nos. 49, 54, 92, 94, 106, and 131; *compare* ABA Committee on Ethics and Professional Responsibility, Informal Opinion No. 1199.

It does not appear that inquirer's professional judgment would be affected by his representing both clients or that the interests of the two clients actually differ. The fact that the police officer who signed the investigation report (but who did not witness the accident) is inquirer's client should not interfere with his ability to represent adequately a driver involved in the accident. Nor should representation of the would-be client affect inquirer's professional judgment regarding his handling of the officer's probate matters. Inquirer will not represent the police officer in the tort case, and any cross-examination of the officer will involve only the officer's conduct in preparing the accident report. The problem of conflicting loyalties involved in other cases is not present here.[1] It appears, therefore, that DR 5-105(A) is not implicated. Even if it were, DR 5-105(C) would allow the multiple representation, if the consent of both clients is obtained, since inquirer evidently can do for each client what each client wants. We thus conclude that, in the circumstances involved, inquirer may represent the would-be client, as well as the officer.

2. Disclosure Of The Multiple Representation To Others Is Not Required In These Circumstances.

Inquirer also asks to whom he must disclose his relationship with the police of-

[1]Moreover, the facts at hand do not suggest that confidential information will be improperly disclosed. See DR 4-101(B).

ficer if he represents the world-be client.

DR 5-105(C) requires only that the lawyer obtain the consent of the clients involved. It does not require disclosure of "differing interests" or the multiple representation to the court or opposing counsel. Nor does any other Disciplinary Rule explicitly require revelation of these matters to opposing counsel of the court.[2]

Inquiry No. 83-11-29
Adopted May 15, 1984

Opinion No. 137

Attorney Spouses: Conflict of Interest, Appearance of Impropriety

- An attorney may represent a client before a government agency at which his spouse is employed, but not on matters in which the spouse participates. The spouse may in appropriate circumstances participate in matters involving a regular client of the private attorney's firm. The conclusion is not affected by the nature of the client or by whether the proceeding is rulemaking or adjudicatory.
- A spouse employed as an attorney by a government agency and a spouse in private practice may not both participate in a consolidated proceeding before the same agency; however, one spouse may participate if the other is screened from participation.

Applicable Code Provisions

- **DR 4-101** (Preservation of Confidences and Secrets of a Client)
- **DR 5-101** (Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment)
- **DR 9-101** (Avoiding Impropriety or the Appearance of Impropriety)

Inquiry

A member of the bar employed as a staff attorney by a federal regulatory agency has asked several questions that can arise when both spouses are attorneys, one of whom is employed by a federal regulatory agency and the other of whom is in private practice. For convenience we shall refer to the inquiring attorney as W, to her husband as H, and to the federal agency as "the Commission." The most pertinent disciplinary rules are DR 4-101 (Preservation of Confidences and Secrets of a Client); DR 5-101 (Conflicts of Interest Impairing Independent Professional Judgment); and DR 9-101 (Avoiding Impropriety or the Appearance of Impropriety).[1]

Discussion

1. In What Circumstances Is H Disqualified from Representing a Client Before the Commission?

Disqualification of H, the spouse in private practice, is governed most directly by DR 5-101. DR 5-101(A) provides:

> "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will or reasonably may be affected by his own financial, business, property, or personal interests."

As a result of his marital relationship, the spouse in private practice may face an apparent conflict of interest under DR 5-101 when in representing a client he is involved in such activities as submitting comments or petitions requesting intervention in a Commission proceeding. The client who is so represented is entitled to the undivided loyalty of the attorney. That loyalty may be compromised under certain circumstances by the possibility that the attorney will be influenced in his representation because of his wife's role at the Commission. The apparent conflict of interest would be greatest in an adversarial proceeding in which the wife participated in any way, and least in informal matters, such as submission of comments in informal rulemaking.

We believe that the proper course for the inquiring attorney to follow under DR 5-101(A) is fully to inform his client of his marital relationship with an attorney at the government agency who could play a role in the matter.[2] If, having been fully informed, the client chooses to continue the representation, there can be no violation of DR 5-101(A). *See* ABA Formal Opinion 340 (1975).

Also pertinent is DR 9-101(A), which provides that

> "A lawyer shall not state or imply that he or she is able to influence improperly, or upon grounds irrelevant to a proper determination of the merits, any tribunal, legislative body or legislator, or public official."

DR 9-101(A) is concerned, among other things, with preserving "public confidence in law and lawyers," EC 9-2, and certainly the public as well as the litigants has a stake in the actions of a government agency. That concern is not remedied by the disclosure to H's client that can satisfy Canon 5. Under circumstances where W appeared to be in a position to influence the outcome, for the private attorney to call the client's attention to the fact that his spouse is an attorney at the Commission might be interpreted to imply that he could bring improper influence to bear. We conclude that for both H and W to participate in any way in the same matter before the Commission, even if Canon 5 is satisfied by the client's consent, nevertheless would be inconsistent with DR 9-101(A).[3]

2. In What Circumstances Must W Disqualify Herself from Participating in Matters Relating to Clients of H or His Firm?

W is a staff attorney who functions both as a trial attorney for the Commission staff in adjudicatory proceedings before the Commission and as an advisor to the Commission in rulemaking and other matters. H's firm represents clients who frequently are parties to adjudicatory proceedings and who participate in rulemaking proceedings by submitting comments. W has stated that she should not participate in any adjudicatory proceeding in which H or H's firm represented a party. We believe that her position in this respect is proper and as to

[2]We leave it to inquirer to determine whether—given the possibility of a chance disclosure during trial of his client relationship with the officer—the failure to disclose that matter himself would be a prudent trial tactic, considering the possible adverse effect of inadvertent revelation on the would-be client's case. *Cf.* Canon 6; EC 6-1; EC 6-4; Canon 9; EC 9-6; DR 9-101.

[1]We note that DR 9-101 as adopted by the District of Columbia Court of Appeals differs from the American Bar Association version. This opinion assumes the absence of any applicable rules or orders promulgated by the Commission. If such rules existed, they would govern as to any aspects to which they applied.

[2]We do not have occasion to consider here whether, for example, the employment of one spouse in a subsidiary branch of a large government agency, which branch exercised no responsibilities in matters of the sort in question, would have to be disclosed. Obviously at some point the significance of the employment might become too attenuated to require disclosure, but in case of any doubt the attorney should err on the side of disclosure. This opinion also does not address situations in which a spouse who is not an attorney may occupy a relevant policymaking position in a government agency, though the ethical requirements we believe are generally similar insofar as the attorney spouse is concerned.

[3]The ABA's Model Rules of Professional Conduct in Rule 1:8(i) provide:

> "A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

The comment to the rule notes that such disqualification is personal to the lawyer, and is not imputed to members of that lawyer's firm. Under the model rule, if consent of both the Commission and the private party were obtained, there would be no ethical objection to the participation by both spouses. The District of Columbia Court of Appeals, however, has not yet decided whether to adopt this rule.

matters personally involving H is required by DR 9-101(A). Compare New Jersey Opinion 434 (104 N.J.L.J. 204 (1979)).[4]

However, W has posed several hypothetical questions involving other situations to which the answers are less obvious:

(A) Would W be required not to participate in any way in a proceeding in which a regular client of H's firm was represented by another law firm. (We assume that the client is well known to be regularly represented by H's firm, perhaps on a retainer basis.)

The applicable provisions again are DR 5-101 and DR 9-101(A).

First, with respect to DR 5-101 a formal conflict of interest is not easy to discern. DR 5-101(A) refers to the attorney's "financial, business, property, or personal interests" being affected. Assuming, as we do, that any such interests of H can be imputed to W, nevertheless it is not apparent how H could benefit in any measurable way from the success of another firm in representing H's regular client. Even if such a situation could be conceived, we do not observe it on the facts as stated here. And in any event, as was earlier noted, a potential violation of DR 5-101 always can be cured by informed and uncoerced consent of all parties.

With respect to DR 9-101(A), however, the situation is less simple. In Opinion 50, this Committee addressed an inquiry from a general counsel of a federal regulatory agency who sought to participate in adjudicatory proceedings in which his wife's law firm represented clients. The practice of the wife within the firm was wholly unrelated to any proceeding before the agency. We concluded that the potential disqualification of the general counsel under DR 5-101 could be avoided by obtaining the informed consent of the agency and all parties, though disqualification under Canon 9 was still a possibility in particular cases. We advised that if a party refused to consent, the matter should be resolved by the agency consistent with the principles of Canon 3 of the Code of Judicial Conduct.

In Opinion 50, we declined to adopt a *per se* rule of disqualification, and instead outlined some of the factors to consider:

(1) the nature of the responsibilities of the two spouses;
(2) their areas of practice;
(3) the closeness or remoteness of their activities to the matter raising the issue of disqualification; and
(4) the nature and magnitude of any financial interest of either spouse in the outcome.

The concern expressed in Opinion 50 about the impact of the presence of the spouse's law firm upon an agency attorney's independent judgment and undivided loyalty to her employer is attenuated where only the spouse's client, represented in that matter by another firm, is before the Commission. On the other hand, the wife of the agency attorney in Opinion 50 was totally uninvolved with the area of law that her husband's agency dealt with, whereas here H practices before the Commission and is not insulated from the firm's practice before the agency generally.

Opinion 50 expressed the view that where the general counsel of an agency was directly involved with a matter in which his spouse's firm, but not his spouse, was involved, appearance of impropriety could be dispelled by candid disclosure of the husband-wife relationship and uncoerced waiver of objection by all involved parties. In the present case, the spouse's firm is completely absent from the proceeding. In these circumstances this Committee believes that the procedure sanctioned in Opinion 50—*i.e.* full disclosure of the spousal relationship, with the opportunity for any of the involved parties to object—may appropriately be followed, but is not necessary unless there are additional facts present that require disclosure, or if it is required by the Commission.[5]

A second situation hypothesized in the inquiry is this:

The spouse at the Commission is assigned to draft a proposed order for the Commission granting or denying an application. Her husband's firm submits a petition on behalf of a client seeking intervention. Such interventions are often made on a protective basis to assure participation should the proceeding be set for an evidentiary hearing.

The first question posed is whether under the Code it "makes a difference" for either attorney if the client seeking intervention is not a private person, but rather a state public service commission charged to protect the "public interest" of its state. That question is quickly disposed of. It makes no difference whom the law firm is representing, whether a public body or a private one. We perceive no basis under the Code for applying different ethical standards to clients based on whether the interests they assert are of public or private bodies.

The second question posed is whether under the Code it would "make a difference" that a third party had filed a petition either requesting a formal hearing, or opposing the grant of the appliction under consideration, so that the proceeding had become one with adversary parties. The answer is governed by what we have said earlier. Even if informed consents dispose of objections under DR 5-101, it still is inappropriate under DR 9-101(A) for H's firm to seek to influence the outcome in any proceeding in which W as a government official is participating, unless H is screened from participation. We recognize that the drafting of an order may be a minimal involvement. Form influences substance, however, and it is too difficult to draw lines based upon whether the agency attorney's actual participation appears on its face to be significant or not. Likewise, we do not believe that it makes a difference whether the client is an applicant or an intervenor. The significant thing is that the client has an interest in the outcome of a matter before the Commission, whether there are adverse parties or not. The presence of an adverse party simply points up the ethical requirement.

(C) A third hypothesis assumes that W is delegated the task of drafting a rule in a rulemaking proceeding for which clients of H's firm have submitted comments. (It is unclear from the inquiry whether those comments were actually prepared

[4]With respect to matters presented by H's firm, her disqualification need not be automatic if H is screened from participation in the matter. Many ethics committees have recognized that private attorneys may litigate against public agencies in which their respective spouses are employed as attorneys, provided both spouses do not participate in the same case. *See, e.g.*, New York Opinion 409 (Aug. 28, 1975), 47 N.Y.S.B.J. 621 (1975); New York Opinion 368 (Nov. 22, 1974), 47 N.Y.S.B.J. 240 (1975); Oregon Opinion 281 (Feb. 15, 1975). They also may appear before public agencies, under the same conditions. *See, e.g.*, Arizona Opinion 77-13 (May 11, 1977); Arizona Opinion 75-21 (Oct. 10, 1975). A few committees have taken a stricter view and concluded that a private attorney (but not his firm) could not defend clients prosecuted by that office. *See, e.g.*, Colorado Opinion 52 (Feb. 9, 1974), 3 Colo. Law. 55 (1974); Illinois Opinion 311 (Oct. 7, 1968), 57 Ill. B.J. 599 (1969).

[5]No precisely applicable Code provision controls in such circumstances. However, as in Opinion No. 50, reference for guidance to the Code of Judicial Conduct, Canon 3 is useful. Under the Canon, a judge is required to disqualify himself where he knows that his spouse has an interest that could be substantially affected by the outcome of the proceeding.

by the H's firm; we shall assume that they were so prepared.)

The question of the proper role of the government attorney spouse in the rulemaking context has not previously been addressed by this Committee. However, we believe that essentially the same considerations apply as with respect to adjudicatory proceedings. The crucial factor is not the presence of formal adverse parties, but the fact that H's client is seeking relief of some sort from the public regulatory body by which W is employed as an attorney. It is inappropriate for H's firm to participate, unless H is screened, in a proceeding, even a rulemaking, in which W is acting and H's client has participated and stands to gain.

* * *

In a separate inquiry, by another inquirer, H is a staff attorney at a federal regulatory agency that sets tariff rates for regulated companies, and W is an associate attorney in private practice. Both she and her law firm represent a number of clients in matters before the agency at which H is employed.

H's agency has announced a consolidated proceeding in which it will review the rates of a large number of companies which it regulates. W's law firm represents some of those companies, and W's firm will prepare comments to be filed on their behalf in that proceeding. H in the normal course of his duties would review submissions and comments in the consolidated proceeding and would provide his analysis and advice to his supervisors and to the decision-makers at the agency. H asks:

(1) Is it permissible under Canon 9 for him to participate as an attorney in this same consolidated proceeding in which W represents interested parties, if a notice of the circumstances of their relationship is published in the *Federal Register* and if "no valid objections" are received?

(2) If the notice procedure in the preceding paragraph is not sufficient, would it be adequate under Canon 9 for H to review and advise concerning particular tariff filings and comments in the consolidated proceeding that are not those submitted by W or her firm—in other words, can the consolidated proceeding be treated as several discrete matters, instead of as a single matter?

The Committee is of the view that H and W cannot work on the same matter representing differing interests (and we treat the agency as having an interest differing from that of the parties submitting tariffs) without there arising a violation of DR 9-101(A). This is not simply a matter under DR 5-101 that can be cured by notice to and consent of all concerned.[6] It goes to the heart of the adversary system. It is inappropriate for spouses to be representing differing interests in the same proceeding.

However, this is not to say that both spouses are necessarily disqualified. Either H can recuse himself, as he states he has done up to this point; or W can decline to participate in this particular matter and be screened by her law firm from any contact with or knowledge of it. If either spouse thus is removed from participation, the other is free to participate.

With regard to the second question, which is whether H can work on some submissions in the consolidated proceeding and W on others, this depends in each case on the particular factual circumstances and nature of the proceeding. It is conceivable, we believe, for there to be matters before an agency that are so unrelated and so uniquely dependent upon their own peculiar aspects that H could work on some and W on others without an ethical problem arising. It is in the final analysis a factual question of what constitutes a single "matter." On the facts presented in this inquiry, however, the agency has issued a formal order consolidating all the tariff reviews into a single proceeding, and it appears that the agency views all as involving applications of related principles. In these circumstances, we do not believe it is possible to treat the interests of one party or another as separate matters. Accordingly, one or the other, but not both, spouses may serve professionally in this single consolidated proceeding.

3. Canon 4.

In the foregoing analyses we have not discussed Canon 4, which provides that "A Lawyer Should Preserve the Confidences and Secrets of a Client," and DR 4-101, which prohibits both the revelation of a client's confidences, and the use of such confidences for the advantage of a third person without the client's consent. Any attorney faces the question of how much he will tell his spouse about a client's confidences. When both spouses are attorneys, and if their daily activities involve representation of interests not always parallel, the importance of care is heightened. We believe that it is enough simply to remind lawyers of their professional responsibilities in this regard. We see no reason to assume that a lawyer who is married will violate his professional responsibilities any more when the other spouse is an attorney than when the spouse is not.[7]

Inquiries Nos. 80-1-5
83-11-28
Adopted June 19, 1984

Dissenting Opinion of Two Committee Members to Opinion No. 137

In its discussion of the first question arising under this inquiry, the majority concludes that personal representation of opposing parties by attorney spouses creates an appearance of impropriety in violation of Canon 9.

We would agree with that conclusion if it were meant only as an observation regarding an ideal standard which attorneys should seek to attain and promote. We cannot, unfortunately, agree that the District of Columbia Code of Professional Responsibility prohibits married couples from personally representing opposing parties. We believe that there certainly *should* be such a prohibition in the Disciplinary Rules (and in the new Model Rules of Professional Conduct, if they are eventually adopted by the Court of Appeals), for it is simply asking too much of any party or of other lay persons to have no reservations about the total client dedication of attorneys who are married to each other *and* personally represent opposing parties. *See* Opinion No. 50. At the present time, however, there is no such provision in the Disciplinary Rules, and the Committee—until the issuance of this Opinion—has consistently maintained the important distinction between, on the one hand, advising inquiring parties of attorneys' minimal obligations under the Disciplinary Rules and, on the other hand, providing supplementary guidance as to the highest, aspirational levels of professional conduct recommended in—but not required by—the Ethical Considerations and the Canons.[1] Failing to maintain this distinction, especially in the complex and largely

[6]As noted in footnote 3, *supra*, under Rule 1.8(i) of the Model Rules of Professional Conduct it would be so curable.

[7]*Accord*, ABA Formal Opinion 340 (Sept. 23, 1975); New Jersey Opinion 434 (104 N.J.L.J. 204 (1979)). *See also* Opinion 50.

[1]Thus, Opinion 48, dealing with the propriety of a member of an administrative agency representing clients before that agency, turned on the prohibition in DR 9-101(C) against "stat[ing] or imply[ing] that he is able to influence improperly or upon irelevant grounds any tribunal, legislative body, or public of-

uncharted Canon 9 area, is all too likely to confuse the attorneys and others (including Bar Counsel) who seek the Committee's advisory guidance on issues of professional conduct.[2]

Accordingly, while we believe that the Committee should *urge* married attorneys not to personally represent opposing parties because such conduct creates the appearance of impropriety and is therefore inconsistent with the "aspirational objectives of the Code," Opinion No. 82, we are not able to join the majority in advising that such conduct is ethically impermissible (and therefore subject to disciplinary action) at the present time in the District of Columbia. *See generally* Opinion No. 82.

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ficial." And in Opinion No. 92, the Committee cautiously

> ...proposed a safeguard [for a *pro bono* program in which private attorneys represent a municipality] which is not contained in any of the Disciplinary Rules that accompany Canon 9. ...[r]egardless of whether disciplinary action can ever be properly based upon the violation of an ethical consideration alone...[because] a government-designed program such as the one proposed by the government should strive to satisfy *the aspirational Ethical Considerations*, as well as the mandatory Disciplinary Rules. ... (Emphasis supplied).

In Opinion No. 50, the Committee observed:

> ...[T]here is no disciplinary rule under Canon 9 at present which directly or by implication deals with the situation which is presented by the inquirer [*i.e.*, "participation by agency general counsel in matters involving parties represented by law firms with which spouse is associated"]. However ECs 9-1, 9-2, and 9-6, which generally require the promotion of public confidence in the legal profession and *exhort* lawyers to avoid both impropriety and the appearance of impropriety, are relevant. [Emphasis supplied]

See also, Opinions No. 53; 66 (concurring opinion); 70 ("...[O]nly the Disciplinary Rules are mandatory in character and so EC 2-14 may not be viewed as enlarging the proscription of DR 2-105(A). See the Preliminary Statement to the Code of Professional Responsibility as to the difference between Disciplinary Rules and Ethical Considerations."); 82 (stating "...the view of a majority of the Committee that conduct which does not violate a Disciplinary Rule cannot properly be characterized as 'unethical.' Such conduct may nevertheless be inconsistent with the aspirational objectives of the Code."); 101 ("...[T]he Canons are not intended to be rules of conduct but only statements of axiomatic norms, embodying the 'general concepts' from which such rules are derived.... It is the Disciplinary Rules that are mandatory in character, and enforceable. ..."); 109; 114 ("...we are not prepared to accord the aspirations expressed in Canon 9 and in Ethical Consideration 9-6 the effect of disciplinary rules...."); 115; 119; 126; and 130.

[2]This danger is particularly acute in matters involving the very general concern in Canon 9 with "the appearance of impropriety." Indeed, EC 9-2 recognizes that "...ethical conduct of a lawyer may appear to laymen to be unethical."

Opinion No. 138

Bank Credit to Finance Legal Fees

- An attorney may participate in an attorney fee financing mechanism which a committee of the District of Columbia Bar wishes to establish in conjunction with a local bank.
- Before suggesting that a client seek a line of credit under the fee financing plan the attorney must take care to ensure that the arrangement is in the client's interest.

Applicable Code Provisions

- **DR 2-106** (Fees for Legal Services)
- **DR 2-103(C)** (Compensating Organization to Secure Employment by a Client)
- **DR 4-101** (Lawyer Shall Not Reveal Confidence or Secret of Client)
- **DR 5-101(A)** (Remaining Free from Financial Interests Which May Affect Exercise of Professional Judgment)
- **DR 5-103(B)** (Financial Assistance to Client)
- **DR 7-101(A)(3)** (Prejudicing Client)

Inquiry

May attorneys participate in an attorney fee financing mechanism under which attorneys would refer prospective clients to a bank to obtain a line of credit?

Discussion

A committee of the D.C. Bar wishes to establish and publicize the following attorney fee financing mechanism in conjunction with a local bank, with the understanding that other banks might later enter the field. The bank may also publicize the plan.

If a prospective client lacked funds to pay a retainer or monthly fees, the attorney would provide the client an application for the bank's "Executive Banking" line of credit. The client would fill out the application, including the following information: (1) the purpose of the credit is to finance legal fees; (2) X attorney is to receive the fees; (3) the client seeks $Y credit, the amount the attorney thinks will be needed to enable the client to pay fees. The attorney woud pay the bank $25 in exchange for speedy processing and the bank's agreement to notify the attorney if the application is rejected. If the credit is extended the client will provide the attorney with the bank's letter of approval and the attorney and client may then execute a retainer agreement. Client will pay fees by checks on the line of credit account. Credit terms are left up to the bank and extension of credit is based on an evaluation of creditworthiness, not on anticipated success of the representation.

1. *An attorney may participate in a credit scheme under which his or her client must pay interest to a bank to finance legal fees.*

This committee has previously determined that an attorney may charge interest on delinquent fees. D.C. Bar Legal Ethics Committee, Opinions 11, 75 and 103. Both this committee and the American Bar Association Committee on Ethics and Professional Responsibility have, without discussion of any Disciplinary Rule, concluded that an attorney may accept credit cards for payment. D.C. Bar Legal Ethics Committee, Opinions 23, 75; American Bar Association Committee on Ethics and Professional Responsibility Formal Opinion 338. Nothing in the rules under Canon 2 suggests that an attorney may not refer a client to a bank to obtain credit to finance the attorney's representation. Indeed, such an arrangement seems consistent with ethical considerations which recognize the importance of making legal services available to persons of limited means (EC 2-16) and the correlative importance of adequate compensation to enable lawyers to serve their clients effectively and to preserve the integrity and independence of the profession (EC 2-17). Although the Disciplinary Rules under Canon 2 address both legal fees and other aspects of the attorney-client relationship and its formation in detail none of them addresses the issue of this inquiry, and therefore none bars the financing mechanism as described.

Of course the limitations of the rules must be observed. Thus, for example, interest charged must not exceed the legal rate (DR 2-106; D.C. Bar Legal Ethics Committee, Opinion 11). And whether the attorney may pay the bank the $25.00 fee depends on the legality of that arrangement. If the fee is illegal an attorney who pays it may violate the prohibition on collecting an illegal fee (DR 2-106(A)). We have considered whether DR 2-103(C) precludes payment of the $25.00 fee. In our view it does not. The rule applies where an organization sends a client to a lawyer, not where the lawyer sends the client to the organization. The attorney is simply compensating the bank for performing a service, not for a referral. Indeed the payment is made regardless of whether the client ultimately retains the lawyer.

Where the representation is in connection with litigation a further issue is whether DR 5-103(B) applies to this fee financing mechanism. For two reasons the

Rule does not apply here. First, the advance here (in the form of a line of credit) flows entirely from the bank, and the lawyer neither advances nor guarantees it. Second, the advance is limited to covering the costs of the representation—in this instance, the litigation.

Moreover, this opinion is restricted to the propriety of the specific proposal before us, in which the attorney's obligations to the client are in no way controlled by the financial relationship between the bank and the client. Once the line of credit has been established, the sole connection between the bank and the attorney is that fee payments will come from the line of credit. The bank will have no legally enforceable interest in the representation. As described by the inquiry "the line of credit mechanism intentionally separates the attorney from the contractual relationship between the potential client and the bank." In no way does the attorney act as a conduit for money flowing between the bank and the client.

2. *Before suggesting to a client that he or she seek the line of credit, the attorney must be satisfied that the credit arrangements are fair and in the client's interest.*

DR 7-101(A)(3) forbids a lawyer to intentionally prejudice or damage his or her client during the course of the representation. An attorney must therefore take care that in recommending that a potential client apply for a line of credit he or she is not placing the client in a financially untenable position. In addition, the attorney should have no interest in the bank (EC 5-3 but no corresponding DR...).

DR 4-101 provides that an attorney may not reveal a confidence or secret of his client except with the client's consent after full disclosure. In some instances the client's interest may be adversely affected by disclosure of the fact of representation. An attorney should explore these considerations with his or her client in the course of considering whether the arrangements are in the client's interest.

Another question is whether the attorney may encourage a client to make use of the line of credit, or is limited to pointing out its availability. ABA Opinion 338, *supra*, forbids a lawyer to encourage participation in a credit card plan, but the basis for the prohibition is not articulated. The line between encouragement and information is too indistinct and lacks foundation in the Disciplinary Rules. At a minimum it seems clear that an attorney should be able to inform a potential client that the representation depends upon payment of fees and that the attorney will accept the representation if a bank extends a line of credit sufficient to cover anticipated fees and costs.

Inquiry No. 83-11-27
Adopted July 17, 1984

Opinion No. 139

Withdrawal Due to Client's Conduct

• Withdrawal from employment is not justified where a fugitive client's presence is not necessary to proceed with an appeal and the client believes the attorney still represents her in the matter.

Applicable Code Provisions

• **DR 2-110(A)(2)** (Withdrawal from Employment Without Prejudice to Client)
• **DR 2-110(C)(1)(d)** (Withdrawal When Client's Conduct Renders It Unreasonably Difficult to Carry Out Employment Effectively)
• **DR 6-101(A)(3)** (Lawyer Shall Not Neglect a Legal Matter)
• **DR 7-101(A)** (Representing a Client Zealously)

Inquiry

Inquirer represented a woman in three separate criminal cases. In one case she was acquitted; in the other two she was convicted. The convictions were appealed jointly in September 1983. Rather than order transcripts, the trial judge asked inquirer and a co-defendant's counsel to prepare a stipulation of facts for the Court of Appeals. This stipulation has not yet been prepared since the client is now a fugitive, and the appeal remains inactive on the Court's docket. Inquirer asks about his ethical obligation concerning the appeal in view of various events that have occurred since the cases were appealed.

After being released from custody pending appeal, the client left the jurisdiction and has had only infrequent telephone contact with inquirer. In October 1983, during the first such contact, the client informed inquirer of her presence outside the District of Columbia. Inquirer advised her to return since her absence violated the terms of her probation, but she did not follow his advice.

In mid-January 1984, inquirer tried unsuccessfully to reach his client to inform her of a hearing on an order to show cause why her probation should not be revoked. After the hearing was rescheduled, he finally reached her and informed her about the rescheduled hearing and a bench warrant issued for her arrest in an unrelated case. The client failed to appear for the show cause hearing and a second bench warrant was issued.

In late February 1984, the client contacted inquirer after she was arrested outside the jurisdiction on the first bench warrant. However, she refused to return pursuant to the second bench warrant, stating that she would return only for the court appearance on the first bench warrant. Inquirer contacted the attorney who represented her in that matter and asked that attorney to contact him once the arrangements for this appearance were made. Hearing nothing for approximately a month, inquirer contacted this attorney and learned that the client had been sentenced to jail. However, when he called the jail, he discovered that she already had been released and that the second bench warrant had not been served.

Inquirer next heard from the client on May 16, 1984, when she telephoned to inform him that she was back in the District of Columbia and wanted to straighten out her affairs. She asked him about the status of her appeal; he responded that nothing had been done due to her fugitive status. She made an appointment to see him the next day, but failed to appear. Inquirer has not heard from her since.

Inquirer asks about his ethical duties and responsibilities in this situation. Specifically, he wants to know whether he should proceed with the appeal, continue to wait for the client to contact him, attempt to locate her, or withdraw from the case. He fears that, if he fails to act on the appeal, the Court will dismiss it for want of prosecution, but that, if he proceeds, the government will move to dismiss due to his client's fugitive status.[1]

Discussion

At issue here is the duty an attorney owes a client who retains minimal contact with him and exhibits minimal interest in her legal affairs. The Code places a number of affirmative duties on an attorney who undertakes representation. DR 6-101(A)(3) provides that an attorney shall not "neglect a legal mater entrusted to him." DR 7-101(A) further requires that:

> A lawyer shall not intentionally:
> (a) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules...

[1]It appears that, if inquirer continues to represent the client, he will be compensated for his efforts. This opinion thus does not address the situation where an attorney seeks to withdraw from employment because he will not be paid. *See* DR 2-110(C)(1)(f).

(2) Fail to carry out a contract of employment entered into with a client for professional services. . . . .
(3) Prejudice or damage his client during the course of the professional relationship. . . .

However, an attorney is not enslaved by a representation agreement. DR 2-110 provides that, in certain circumstances, a lawyer may withdraw from employment. Particularly relevant here is DR 2-110(C)(1)(d), which permits an attorney to seek permission to withdraw if his client "renders it unreasonably difficult for the lawyer to carry out his employment effectively."

This Committee twice has rendered opinions under this provision. In Opinion No. 85, an attorney repeatedly had asked his client to sign and return a document that he had prepared at her request and without which he could not proceed. Given the client's history of delay and the attorney's diligent attempts to reach her, the Committee ruled that the client's conduct made it "unreasonably difficult for the lawyer to carry out his employment effectively" and approved withdrawal.

In Opinion No. 108, the Committee found that a client's conduct justified withdrawal where the client had moved (apparently outside the area) and left no forwarding address or telephone number. The inquirer—who needed information and instructions from his client before he could proceed—had made numerous unsuccessful efforts to reach the client. The attorney was particularly concerned because the statute of limitations was running on his client's claim. Nonetheless, the Committee ruled that the client's conduct, coupled with the attorney's diligent efforts to locate her, justified withdrawal.

Both of these inquiries involved situations where additional contacts were necessary to enable the attorneys to proceed. In contrast—while the client's conduct in the present case obviously makes effective representation more difficult—client contact does not appear essential and the inquirer is thus able to proceed without the client's participation. It appears from the facts that the client expects inquirer to proceed with the appeal and that he has her authority to do so. Under these circumstances, the client's absence does not amount to "conduct [that] renders it unreasonably difficult for the lawyer to carry out his employment effectively."

Also pertinent is DR 2-110(A)(2), which requires an attorney, when withdrawing from employment, to take "reasonable steps to avoid foreseeable prejudice to the rights of his client. . . ." This rule indicates that, before withdrawal, the client should be notified and given time to employ other counsel. This rule could present a problem to inquirer, since he could not notify his client of his intention to withdraw if he cannot contact her. We believe the best solution is for inquirer to avoid this issue by continuing the representation.

We conclude that inquirer should continue the representation and may proceed with the appeal despite the ruling in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970). In *Molinaro*, the Supreme Court dismissed a pending appeal because petitioner's failure to surrender to state authorities "disentitles [him] to call upon the resources of the Court for determination of his claims." 396 U.S. at 366. While a dismissal in the present situation is possible if the appeal is perfected, this is by no means a foregone conclusion. For example, the client may reappear before dismissal results.

Inquirer thus should continue to represent the client in the manner he deems appropriate and renew his efforts to contact her and advise her about her legal obligations. This course will allow inquirer to meet his obligations not to "[p]rejudice or damage his client during the course of the professional relationship" (DR 7-101(A)(3)) and not to "[n]eglect a legal matter entrusted to him" (DR 6-101(A)(3)).

Inquiry No. 84-6-19
Adopted July 17, 1984

Opinion No. 140

Multiple Representation, Undertaking of

- An attorney may not represent both passenger and driver in a suit against a second driver when either the passenger or the driver has sued or will sue the other over the same occurrence. DR 5-105(A).
- An attorney may represent both passenger and driver when their litigation interests appear to be in harmony and after proper disclosure and consent. DR 5-105(C).
- An attorney may represent both passenger and driver with differing litigation interests if both parties are aware of and agree to forego potential claims against the other. DR 5-105(C).
- An attorney may advise but need not compel the passenger and driver in a potential multiple representation to seek the advice of independent counsel as to the propriety of this proposed multiple representation. DR 5-105.
- Subsequent developments may compel the attorney to withdraw completely from the multiple representation. DR 5-105(B).

Applicable Code Provisions

- **DR 2-110** (Withdrawal from Employment)
- **DR 4-101** (Preservation of Confidences and Secrets of a Client)
  4-101(A)
  4-101(B)
  4-101(C)(1)
- **DR 5-105** (Refusing to Accept or Continue Employment If the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer)
  5-105(A)
  5-105(B)
  5-105(C)

Inquiry

When may an attorney represent two or more persons in a personal injury case arising out of an automobile collision where one was the driver and the other, the passenger, in the same vehicle?

Discussion

Whether an attorney may simultaneously represent a driver and passenger who are both plaintiffs in a personal injury case arising out of an automobile collision poses a classic conflict of interest question. An attorney is not automatically barred from representing both parties.

When an attorney is requested to undertake a multiple representation, the attorney is obliged to conduct a preliminary investigation, including an interview with each client individually, to determine all possible bases of liability. The attorney's ethical obligations thereafter depend on the results of the preliminary investigation.

The key issue of a multiple representation is whether the driver and the passenger are allied against a common adversary or whether either may seek damages from the other or attempt to seek absolution from responsibility at the expense of the other. This question may arise at the outset of the proposed representation or after the representation has commenced. The obvious circumstances are at either end of the spectrum. In the intermediate circumstance, a practical test is whether both parties can agree on a joint statement of facts. If they can, the attorney may undertake the multiple representation.

1. *Multiple Representation Is Not Permitted Where the Driver and Passenger Are Asserting Adverse Positions, One Against the Other.*

An obvious prohibited multiple representation exists where the driver is or will be sued by the passenger of the same vehicle, though both are also suing the other vehicle's driver. With the driver and passenger of the same vehicle directly antagonistic against each other, the lawyer must decline, for it is "obvious" that the attorney cannot represent both. District of Columbia Code of Professional Responsibility DR 5-105(A)(1983) ("DR _____").

2. *The Attorney Can Represent Both If the Passenger's and Driver's Interests Are In Complete Harmony.*

An attorney may represent both the driver and passenger when satisfied that their interests are probably in complete harmony. For example, where the driver and passenger are stopped at a red light and their vehicle is struck by another from the rear end, the attorney can conclude that "it is obvious that he can adequately represent the interest of each..." DR 5-105(C). Even so, the attorney must obtain the consent of each "to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgement on behalf of each." DR 5-105(C). A checklist for obtaining the consent of the clients might include ("Checklist I"):

(1) Each party recognizes that upon preliminary investigation the attorney does not find any apparent basis for either party's independent liability to the other. The attorney advises each of how conflicts might theoretically arise between them.
(2) Each party states to the other and to the attorney that no additional facts are known which might create a basis for an independent basis of liability against the other.
(3) Each party agrees that the attorney is free to disclose to the other party, in the attorney's discretion, all facts obtained by the attorney.
(4) At the outset, the attorney outlines potential pitfalls in a multiple representation (D.C. Bar Legal Ethics Committee, Opinion 49 (1978) ("Opinion 49") (where this Committee extensively discussed the apparent contradictions in the language of DR 5-105(A) and (C)) and advises each party of the opportunity to seek the opinion of independent counsel as to the advisability of the proposed multiple representation; and, each either consults separate counsel or advises that no separate consideration is desired.
(5) Each party agrees that further investigation may reveal substantially differing interests. If then they do not compromise these differences, the attorney is required to notify each client and withdraw from the representation of both without injuring either. DR 2-110; 5-105(B).
(6) Each party agrees that the attorney may represent both in the litigation. DR 5-105(C).

cf. Matter of James, 452 A.2d 163, 167 (D.C.App. 1982); ABA Committee on Ethics and Professional Responsibility, Informal Opinion 1441 (1979) ("Informal Op. 1441").

The clients are thus alerted of the largely theoretical possibility that a conflict could arise between them in forging a claim against the other vehicle's driver. Such a situation might develop if the other vehicle's driver asserts a counterclaim against the driver on grounds that the automobile in front was driving in reverse at the time of the collision. More likely, a theoretical conflict could arise from the degree of injury each suffered. The attorney is then obliged to avoid compromising the damages claim of one client at the expense of the other. In the main, multiple representation on these general facts is not prohibited, once the proper consent is obtained.

3. *A "Joint Statement of Facts Test" Will Help Determine Where a Possible Conflict Exists.*

The intermediate circumstance is where some facts exist at the outset which might permit the passenger to sue the driver or the driver to shift responsibility to the passenger for any aspect of the occurrence. For example, a driver might defend against a counterclaim by asserting that the passenger distracted the driver and is liable for any injury caused to those in the other vehicle.

A practical test to determine the extent of the potential conflict includes ("Checklist II"):

(1) The driver and the passenger agree to a single comprehensive statement of facts describing the occurrence.
(2) The attorney reviews the statement of facts from the perspective of each of the parties and determines that it does not support a claim by one against the other.
(3) The attorney determines that no additional facts are known by each party which might give rise to an independent basis of liability against the other or against themselves by the other.
(4) The attorney advises each party as to the possible theories of recovery or defense which each may be foregoing through this joint representation based on the disclosed facts. DR 5-105(C).
(5) Each party agrees to forego any claim or defense against the other based on the facts known by each at the time. DR 5-105(C).
(6) Each party agrees that the attorney is free to disclose to the other party, at the attorney's discretion, all facts obtained by the attorney.
(7) The attorney outlines potential pitfalls in multiple representation (Opinion 49) and advises each party of the opportunity to seek the opinion of independent counsel as to the advisability of the proposed multiple representation; and, each either consults separate counsel or advises that no separate consideration is desired.
(8) Each party acknowledges that the facts not mentioned now but later discovered may reveal differing interests, which, if they do not compromise these differences, may require the attorney to withdraw from the representation of both without injuring either. DR 2-110; 5-101(B).
(9) Each party agrees that the attorney may represent both in the litigation. DR 5-105(C).

cf. Matter of James, supra, 452 A.2d at 167; Informal Op. 1441.

The parties may agree to proceed in harmony, if each fully understands that he or she is foregoing a possible theory of recovery or defense by the decision to have common representation. To illustrate: the driver states that his car was struck while going through an intersection on a green light. The passenger was not looking at the traffic light. The other vehicle's driver asserts that the driver went through a red, not a green light. The "joint statement of facts test" commits both driver and passenger to the green light, and will preclude the passenger from pursuing a claim against the driver of his vehicle based on the light being red. The passenger's decision to forego a potential claim against the driver may be based on considerations of family ties or friendship or for any other reason, but it is a decision the passenger may make.

This is a permitted multiple representation which is "adequate to the purposes of the clients in the light of the understanding of the nature of the representation that is necessarily implied by each client's consent to the dual representation after the disclosure to each client of how the duality of the representation will affect the lawyer's performance." Opinion 49; *see also*, D.C. Bar Legal Ethics Committee, Opinion 54 (1978) ("Opinion 54").

The statement of facts test is well suited to driver/passenger automobile collision cases. It is not necessarily as adaptable to multiple representation problems which involve ongoing representation before administrative agencies (Opinion 54), representation of entities in competing businesses (Opinion 49), or other complex representation situations.

4. *No Obligation Should Exist for the Attorney to Advise the Party to Consult with Separate Counsel Before Determining to Embark on a Common Representation.*

The attorney faces a possible conflict of interest when advising in favor of a common representation, since the attorney is generally interested in acquiring both parties as clients. However, the attorney need not require both parties to seek the advice of independent counsel as to the propriety of the multiple representation. This is a costly proposition, and, in most cases, would add little to each party's ability to make an informed choice of counsel if the attorney had discussed the implications of joint representation. *See* Checklists I and II, *supra*.

5. *After the Attorney Has Embarked on the Dual Representation.*

Undiscovered facts may later sunder the multiple representation even of driver/passenger cases. Even so, the attorney who undertook the multiple representation at the outset on the available facts and with the required disclosure acted ethically. If unresolvable conflicts arise during the representation, either the driver or the passenger may then choose to withdraw agreement to the combined statement of fact because a conflict of interest now exists and new counsel is required. Indeed, separate new counsel may then be required for each client. *See* Informal Op. 1441; DR's 2-110, 4-101 and 5-105.

Later learned facts which may affect the continued multiple representation by a single counsel include undiscovered or concealed information about the driver's mental or physical condition or conduct. These may give the passenger a basis for a claim against the driver which did not previously exist.

A conflict may also raise from a discovery that limited funds are available from the defendant to compensate the injured parties. A counsel for the driver and passenger may then find that the damages available to compensate one may affect the amount available for the other. If represented by separate counsel, then each counsel would seek the advantage of the single client without regard to impact upon the other. In sum, the initial decision to represent the driver and passenger does not mean that the conflicts question may not arise again, no matter how thorough the initial inquiry and well grounded the basis for proceeding with the joint representation.

Inquiry No. 81-10-30
Adopted July 7, 1984

Opinion No. 141

Professional Organization Designation on Letterhead, Business Cards or in Advertisements

• There is no impropriety if an attorney merely states, on business cards, stationery, or change of address announcements, or in advertisements, that he or she is a "Member of the Commercial Law League of America." Care should be exercised, however, not to use the designation in a way that is fraudulent, misleading, or deceptive, in a way that constitutes showmanship or self-laudation, or in a way that implies that the attorney is a certified commercial law expert.

Applicable Code Provisions

• **DR 2-101(B)** (Definition of a False, Fraudulent, Misleading, or Deceptive Statement or Claim)
• **DR 2-101(C)(4)** (Lawyer Shall Not Use Showmanship or Self-Laudation in Public Communication)
• **DR 2-102(A)** (Professional Cards, Announcement Cards, Letterhead or Other Professional Notice Shall Not Include Statements or Claims that are False, Fraudulent, Miselading or Deceptive)
• **DR 2-105** (Limitation of Practice)

Inquiry

The inquirer, an officer of the Commercial Law League of America, asked for an opinion concerning the propriety of the use of the designation, "Member of the Commercial Law League of America," by attorneys in every circumstance that is likely to arise, including specifically its use in change of address announcements, stationery, business cards, and in advertisements.

Discussion

The Canons of Ethics for the District of Columbia Bar state that the legal profession should help laypersons "to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." (EC 2-1). That injunction is limited by the Disciplinary Rules only in the case of advertising or professional announcements or notices which are likely to attract clients "by the use of showmanship or self-laudation" (DR 2-101(C)(4), DR 2-102(A)) or by practices which could be "fraudulent, misleading, or deceptive" (DR 2-101 (B) and DR 2-102(A)). In addition, DR 2-105(A) prohibits an attorney from holding himself or herself out as a recognized or certified specialist, except for some designated exceptions, such as patent attorneys. However, DR 2-105(B) provides that a statement or announcement which holds an attorney out as a specialist shall not constitute a violation of DR 2-105(A) unless it is fraudulent, misleading, or deceptive within the meaning of DR 2-101(B), or constitutes showmanship or self-laudation within the meaning of DR 2-101(C).

There is nothing inherently fraudulent or deceptive about the mere use of the designation, "Member of the Commercial Law League of America." Nor do we believe that its use inherently constitutes showmanship or self-laudation. It is possible, however, that the use of the designation could be misleading since it might suggest a specialization not expressly permitted by DR 2-105(A). Potential clients might believe that League members were better qualified to handle business problems, thus unfairly deceiving laypersons (and also disadvantaging competent attorneys who are not League members or League members who do not wish to advertise their League affiliation). Thus, a question is raised as to whether the use of this designation suggests a specialization or an unverifiable representation of quality that might be so inherently misleading as to warrant prohibition.

D.C. Bar Legal Ethics Committee, Opinion No. 110 (1982) discussed a related issue. A law firm included the descriptive term, "The Immigration Lawyers," in its advertisements. The opinion carefully considered whether use of the term could mislead potential clients into believing that these attorneys were the only lawyers

qualified to practice immigration law and concluded that an ordinarily prudent person would not be so misled.

A similar issue also arose in D.C. Bar Legal Ethics Committee, Opinion 95 (1980). Bar Counsel inquired whether advertising containing the description that the attorneys were "specializing" in personal injury claims would violate the Canons. The opinion concluded that this would not because (1) the description did not imply that the lawyers have been officially recognized or certified in their specialty; (2) the description was not deceptive.

These considerations apply here as well. The use of the designation at issue by attorneys in professional announcements and in advertisements does not imply that the League's attorneys are the only qualified commercial law lawyers, that League members are superior, or that League members are commercial law specialists. We do not believe, moreover, that a significant percentage of laypersons would be likely to make an erroneous assumption as to the relative quality of League members, to believe that only league members are qualified to practice commercial law, or to believe that the Commercial Law League of America is the only organization of business lawyers. Accordingly, we do not believe that the designation is inherently fraudulent, misleading, or deceptive. Further, although the designation may not be "necessary" to assist the public to secure proper legal counsel, it certainly could be helpful in this regard. And, of course, the simple use of the designation does not constitute showmanship or self-laudation.

These considerations apply to both advertisements and professional announcements, including business cards, stationery, and change of address announcements. We do not believe that the circumstances involved warrant treating these differently.

Inquiry No. 83-10-25
Adopted October 16, 1984

Opinion No. 142

Television Advertisements

- A law firm's television advertisement contravenes the District of Columbia Code of Professional Responsibility's proscription against testimonials about, and endorsements of attorneys.

Applicable Code Provisions

- **DR 2-101(C)** (Publicity and Advertising, Use of Public Communication).
- **EC's 2-2 through 2-10**

Inquiry and Introduction

The Committee has been asked to advise of whether a law firm's television advertisements are consistent with the provisions of DR 2-101(C).[1] These advertisements feature a local sports figure who is dressed in a suit and tie and who makes the following statements:

> I don't like to get hurt and I don't like to lose. I don't imagine you do either. But, if you have been hurt on the job or by someone's carelessness, call the law firm of [name of firm]. It could be the most important call you'll ever make. I'd rather you hear it from me than from a stranger.

A narrator then states: "[Name of firm.] Largest personal injury law firm in the area with over 30 years experience." Short film segments showing the athlete performing successfully on the playing field are interspersed throughout two of the three versions of the advertisement.

It has been suggested that, for two reasons, the Committee should not address the issues arising from the advertisement at this time. First, the constitutionality of DR 2-101(C) has been questioned. We note in this regard that in December 1977, the Bar's Board of Governors recommended that the District of Columbia Court of Appeals amend DR 2-101 so as essentially to permit all truthful advertising.[2] In an accompanying memorandum to the Court, prepared by this Committee, the Board argued that, in light of the decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), its proposal was preferable to either of the two proposals formulated by the American Bar Association (ABA) in 1977,[3] since the Bar's proposal had the "very substantial advantages of simplicity, and of allowing maximum latitude for constitutionally protected, and socially useful speech." Memorandum re Proposed Amendments to the Code of Professional Responsibility Dealing with Advertising and Related Matters, dated December 31, 1977, at 26. *See also id.*, at 8-9.[4]

The Court of Appeals, however, adopted DR 2-101 in its present form,[5] and this Committee is bound to interpret the Rule as it currently reads. As we stated in Opinion No. 117, "...we see it as this Committee's proper role to apply and interpret DR 2-101(C)(3) as we find it, without venturing an opinion as to its constitutionality." Thus, any constitutional issues raised by the Rule's restrictions must be resolved in some forum other than this Committee.

It also has been suggested that the Committee should not address this (or, presumably, any other) inquiry until the Court of Appeals decides whether to adopt the ABA's new Model Rules of Professional Conduct. The Bar's Special Committee on the Model Rules of Professional Conduct[6] is presently reviewing the Model Rules and preparing a detailed report to the Board of Governors. The Board will review the Committee's recommendations and transmit the Bar's proposals to the Court of Appeals which, of course, determines finally the ethical standards govern-

[1]In addition to its usual review process, the Committee has had the benefit of a comprehensive submission on behalf of the firm which has been carefully considered. The Committee also believes that in developing the advertisement the law firm has diligently and conscientiously attempted to comply with the requirements of the applicable Disciplinary Rules.

[2]The proposed DR 2-101 read in its entirety as follows:

> A lawyer shall not knowingly make any representation about his or her ability, background or experience, or that of the lawyer's partner or associate, or about the fee or any other aspect of a proposed professional engagement, that is false or misleading, and that might reasonably be expected to induce reliance by a member of the public.

[3]In July 1977, the ABA Task Force on Lawyer Advertising published and transmitted two proposals, labeled "A" and "B," for consideration by the ABA House of Delegates. At its August 1977 meeting, the House of Delegates adopted Proposal A as the Model Code's advertising provisions. However, both proposals were subsequently distributed to the chief judges of each jurisdiction's highest appellate courts for their consideration.

[4]Indeed, the Committee continues to be of the view that the Canon 2 "duty to make legal counsel available," the need recognized in Ethical Considerations 2-1 through 2-5, for useful and reliable information when selecting an attorney, and the desirability and policy reflected in Ethical Considerations 2-6 through 2-10 of improving and expanding the availability of such information all suggest that truthful, non-misleading, but otherwise unrestricted advertising of legal services would on balance best serve the public interest.

[5]The Court of Appeals also revised DR 2-103 regarding solicitation. Essentially, DR 2-103 now permits all truthful solicitation of competent individuals.

[6]By letter dated August 15, 1983, to the Chief Judge of the District of Columbia Court of Appeals, the President of the District of Columbia Bar proposed the establishment of the Special Committee, and on September 12, 1983, the Chief Judge notified the Bar that the Court approved the establishment of the Special Committee.

ing the practice of law in the District of Columbia. In the meantime, the present Code continues in effect,[7] and the Committee is obligated to respond to inquiries arising thereunder. *See* Committee Rule A-1. Consequently, we will proceed with this inquiry and all others, even though our conclusions may subsequently be affected by changes in the present Code.

Discussion

This inquiry arises under DR 2-101(C), which provides:

> A lawyer shall not, on his or her own behalf, or on behalf of a partner or associate, or any other lawyer affiliated with the firm use or participate in the use of any form of public communications which:
> (1) Contains statistical data or other information based on past performance or prediction of future success;
> (2) Contains a testimonial about or endorsement of a lawyer;
> (3) Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public;
> (4) Is intended or is likely to attract clients by use of showmanship or self-laudation.[8]

The Committee has determined that the advertisement at issue contravenes the prohibition against "a testimonial about or endorsement of a lawyer."[9]

Neither "testimonial" nor "endorsement" is defined in the District of Columbia Code of Professional Responsibility or ABA Proposal B, the apparent source of the present DR 2-101(C)(1).[10] One source of guidance may be found in the Federal Trade Commission (FTC) regulations on endorsements and testimonials in advertising, 16 C.F.R. §255. These regulations treat endorsements and testimonials identically, and define an endorsement as "any advertising message...which message consumers are likely to believe reflects the opinions, beliefs, findings or experience of a party other than the sponsoring advertiser...." 16 C.F.R. §225.0(b).

It has been suggested that this definition creates a distinction between a person who merely acts as a paid spokesman for a law firm, allegedly the situation here, and someone who has used or purports to have used the law firm. We disagree that the FTC distinction makes or connotes such a distinction.[11] According to the regulations, an advertising message can reflect "the opinions, beliefs, findings *or* experience" of the speaker. If the definition actually made the claimed distinction, only the words "findings or experience" would be included. Instead, an endorsement, as defined by the FTC, can also reflect the opinions or beliefs of the speaker. One need not appear or claim to be a user of services in order to convey the impression that one has an opinion or belief about them.

Furthermore, the suggested distinction is not consistent with the purposes of any policy considerations reflected by DR 2-101(C). The Code is concerned that individuals receive information that will assist them in making an informed decision when selecting an attorney. *See* Ethical Considerations 2-6 through 2-9.[12] Consistently with this goal, there should, if anything, be greater concern with the paid spokesman who, for a fee, will advertise any lawyer's practice than with the person who speaks from personal experience.[13]

Applying then the FTC definition, an endorsement is a statement which "consumers are likely to believe reflects the opinions [or] beliefs" of a third party. The purpose of "the most important call" and "I'd rather you hear it from me" statements can only be to convince viewers that the spokesman would not be telling them to call the law firm unless he believed the firm was good and might win their case. Why else would he say this could be the most important call the viewer will ever make unless he approves of the way the law firm does business? Why else would he prefer they hear this information from him?

Apparent approval of a product or service and conveyance of that approval to the public are at the heart of an endorsement. That is precisely the impression this advertisement leaves with the viewer—and this is its only possible purpose.

In reaching this conclusion, we do not make a distinction between celebrity and non-celebrity endorsements. A law firm should not be constrained in its choice of a spokesperson and we doubt the Court intended to proscribe the use of celebrities.[14] While we are not blind to the ability of a celebrity to attract attention, we are not suggesting a ban on celebrity spokespersons due solely to this ability. Our focus under DR 2-101(C)(2) is on the message each advertisement contains and how it is conveyed to the public.

Inquiry No. 83-11-31
Adopted December 11, 1984

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[7]By order dated September 12, 1983, the Court of Appeals ordered that the Model Rules of Professional Conduct, as adopted by the ABA House of Delegates, shall not become effective in the District of Columbia pending further order of the Court.

[8]It has been argued that a "misleading" standard should be applied to every advertisement before the question of compliance with DR 2-101(C) can be reached, and that this approach is constitutionally mandated. While a majority of the Committee agrees that these advertisements are not misleading or deceptive, we will not discuss any constitutional aspects of this inquiry for the reasons stated above. Since the Committee's function is to interpret the Rules as they currently read, we cannot read into them a threshold "misleading" standard.

[9]The inquirer also asked whether the narrator's statement about the law firm being the largest in its particular area of law constitutes a statement that is not reasonably verifiable by the public. First, a statement about firm size does not necessarily imply anything about its quality. Second, even if this statement does bear on the firm's quality, it is a concrete fact that would be possible to verify if a person truly wanted to do so. *See* Opinion No. 117. Consequently, we see no impropriety under DR 2-101(C)(3) in the use of the word "largest."

The inquiry also asks whether a law firm could state that it is the leading or the fastest growing law firm in a particular area of law. Although the transcript of the present advertisement does not include these representations, we will address them.

Describing a law firm as being the "leading" firm implies, if not states, that it provides higher quality legal services than any other firm. However, there is no discernible way to verify such a claim; thus such a description is similar to the statement regarding "quality legal services" that was found to violate DR 2-101(C)(3) in Opinion No. 117.

Stating that a firm is the fastest growing firm is more problematic. If it means only that the number of attorneys with the firm is increasing the fastest, this statement should be verifiable, although not without great difficulty. However, it could also mean that its clientele is growing the fastest, a fact that would be practically impossible to verify. On balance it appears that this assertion is not susceptible of verification and thus prohibited by DR 2-101(C)(3).

[10]DR 2-101(C)(3) of Proposal B is identical to the District of Columbia's DR 2-101(C)(2). *See* n.3, *supra*.

[11]Similarly, we do not agree that the dictionary definitions brought to our attention support the claimed distinction.

[12] EC 2-8B, for example, cautions, "Only factual assertions, and not opinions, should be made in public communications."

[13]This does not mean that a person who has used the firm would necessarily be permitted to appear in an advertisement on the firm's behalf. We are stating only that a client recommending a firm would be more consistent with the Code's intent of imparting relevant factual information to the consumer, as is the practice that occurs in everyday life. *See also* Ethical Considerations 2-6 and 2-8.

[14]None of the ethical considerations accompanying this disciplinary rule address the identity of the person making an advertisement; the concern reflected therein is with the information being imparted.

Opinion No. 143

Joint Representation in Divorce Proceeding

• As a general rule joint representation of a couple seeking a divorce is not ethically permissible. However, this inquiry involves parties seeking joint representation who are childless and appear to have relatively equal employment status and educational backgrounds and who have already agreed upon a division of property and all other substantial settlement terms before retaining counsel; assistance of counsel is sought solely for the purpose of implementing the couple's preexisting agreement; both spouses have provided separate uncoerced consent to such joint representation after being provided full disclosure of its limitations and possible pitfalls, and it is the affirmative objective of the parties to obtain an uncontested divorce by impelmenting their agreement at the lowest possible cost and without retaining separate counsel. On these limited and specific facts we conclude that it is not unethical for a lawyer to provide the joint representation sought.

Applicable Code Provisions

• **Canon 2** (A Lawyer Should Assist The Legal Profession In Fulfilling Its Duty To Make Legal Counsel Available)

• **DR 5-105** (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgement of a Lawyer)

• **DR 7-101** (Representing a Client Zealously)

Inquiry

The inquirer is a private attorney engaged in domestic relations practice. The inquirer has been asked to represent a husband and wife seeking an uncontested divorce base on voluntary separation. The couple are both employed in equivalent positions at equivalent salaries and have similar education backgrounds. They are childless. Their only significant property is a condominium apartment which they own jointly. Prior to contacting the inquirer the couple had agreed that no alimony would be paid and that they would sell their condominium and divide the proceeds evenly and that if the condominium had not been sold by the time their divorce became final that they would enter into a partnership agreement in order to continue their efforts to sell the condominium. The inquirer has been asked to act as counsel for both spouses in implementing their preexisting agreement, including obtaining a divorce decree, and after having been provided with a full explanation of the advantages of having separate representation, both spouses have indicated that they affirmatively wish to be represented jointly and to avoid separate legal representation. The inquirer has asked us whether the fact that the two potential clients are seeking a divorce and that division of the proceeds of a sale of jointly owned propety is contemplated precludes providing the representation the couple seeks.

Procedural Background

In its initial consideration of this inquiry a majority of the committee reached the conclusion that on the facts presented it was not unethical for the inquiring attorney to provide the representation sought. A minority of the committee reached the conclusion that joint representation of persons seeking a divorce is unethical in all circumstances, including those presented. Since the committee was divided and the decision of the committee on this issue might potentially have a material impact on a significant segment of the bar and the public, pursuant to its rules, the committee voted to submit majority and dissenting opinions for public comment under its "opinion of broad scope" procedures.

The original majority and dissenting opinions were published for comment in the May/June 1984 issue of the *District Lawyer*. As a result, a substantial number of comments were submitted and most disagreed with the conclusion reached in the majority opinion. In particular, the comments of attorneys engaged in domestic relations practice emphasized the concerns expressed in the dissenting opinion that a broad reading of the majority opinion might have adverse effects on persons seeking divorce in circumstances not equivalent to the relatively unusual facts presented by the inquirer.

We have given careful consideration to the comments received. We have also given careful consideration to the views of the lay members of the committee, all of whom reached the conclusion that parties seeking joint representation in the limited circumstances presented by this inquiry should be able to obtain the type of representation they seek. As we see it, our task is to attempt to avoid the real practical pitfalls described by the commenting domestic relations practitioners and, at the same time, not to unreasonably curtail a form of representation affirmatively sought by at least some members of the public. We also are constrained by the fact that we must render an opinion on the particular facts before us. If we were to agree with the dissent and those who support it, we would have to conclude that it would be unethical on the particular facts before us to provide the joint representation sought by the inquiring attorney's clients.

Despite our respect for the views expressed in the comments received, the majority of the committee concludes, as it did originally, that on the precise facts presented to us it would not be unethical for an attorney to provide the joint representation requested. We wish to emphasize, however, that our conclusion is strictly limited to the facts presented to us and that in the vast majority of cases, for all the reasons described in the dissent, joint representation of a couple seeking a divorce would *not* be ethically permissible. The entire committee agrees that, as a general rule, persons seeking a divorce cannot ethically be represented by the same lawyer. The majority only reaches the conclusion that it does on the facts before us because this seems to us to be one of those rare cases in which an exception is permitted.

Discussion

As a general rule, DR 5-105 (relating to client conflicts) and DR 7-101 (requiring zealous representation of every client) preclude joint representation of a husband and wife seeking a divorce. However, in the particular and exceptional circumstances presented here, neither DR 5-105 nor DR 7-101 imposes an absolute bar to joint representation of such a couple where the representation is limited in scope, there is no existing conflict between the two clients as to the objective of the representation, and the clients have given their uncoerced consent after full disclosure of the limitations inherent in the joint representation and the possible effects of those limitations on the exercise of their attorney's independent judgment.

DR 5-105 provides in relevant part:

> "(A) A lawyer shall decline proferred employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or it it would be likely to involve him in representing different interests, except to the extent permitted under DR 5-105(C).
>
> "(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, ex-

cept to the extent permitted under DR 5-105(C).

"(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

We have never had occasion to construe DR 5-105 in the context of a divorce proceeding. However, in Opinion No. 49 we discussed application of the Rule to a situation in which two corporations asked a single lawyer to draft an agreement between them after the principals of the corporations had previously negotiated and agreed to its general terms. In that opinion we concluded that such joint representation was proper if each client consented to it after full disclosure of the possible effects of the dual representation upon the exercise of the lawyer's independent professional judgment on behalf of each. We permitted joint representation in that case even though it was expressly recognized in the opinion that "it is highly likely, in terms of DR 5-105(A), that the law firm's exercise of independent professional judgment on behalf of one client or the other *will* be affected by undertaking the dual representation." (Emphasis added.)

In reaching that conclusion, the Committee, after a thorough analysis, determined that subsection (C) of the Rule must be construed so as to permit representation based on full disclosure and consent in situations in which the requirements of subsection (A) of the Rule would not otherwise be met:

> . . . The requirement of DR 5-105(C) is that each client consent 'after full disclosure of the effect of' the dual representation 'on the exercise of' the lawyer's 'independent professional judgment on behalf of each.' It is assumed, in other words, that consent may be given even though, to the knowledge of the client, the exercise of the lawyer's independent professional judgment may be impaired; it is assumed that it is not obvious that the exercise of his judgment will not be impaired. Unless DR 5-105(C) was deliberately drafted to be a nullity, this must mean that 'adequately represent' in the first part of DR 5-105(C) means something other than to represent with unimpaired professional judgment. What it has to mean is that the representation will be adequate to the purpose of the clients in the light of the understanding of the nature of the representation that is necessarily implied by each client's consent to the dual representation after the disclosure to each client of how the duality of the representation will affect the lawyer's performance.

The American Bar Association Committee on Ethics and Professional Responsibility has taken essentially the same position in permitting a lawyer, acting as joint counsel to both parties, to draft a contract between two municipalities (ABA Informal Opinion No. 518) and a loan agreement between a bank and a borrower (ABA Informal Opinion No. 643) where the disclosure and consent requirements of DR 5-105(C) are met.

The fact situations considered in our Opinion No. 49 and in the ABA opinions cited did not involve a proceeding before a court—as joint representation with respect to a divorce ultimately does. In our Opinion No. 54, which related to joint representation of intervenors in a nuclear power plant licensing proceeding, we recognized that litigation may present a more troublesome case. On the facts presented in that situation, one intervenor was unalterably opposed to licensing any facility under any circumstances and the other was prepared to compromise.

> [W]here the attorney is viewed as an adviser, negotiator, or scrivener, informed consent usually suffices, but . . . a more difficult circumstance occurs when the clients view the attorney as advocate because the advocacy rule carries the implication of the championing of one position over another.
>
> In the inquiry before us, it is clear that the clients view the law firm's representation as including an advocacy role. Each client wants to win something, one more than the other, in the licensing proceedings. Here it appears [that] what each party needs is an advocate, not a negotiator or scrivener.
>
> * * *
>
> However, as we stated in Opinion No. 49, what 'adequately represent' in the final part of DR 5-105(C) must mean is that representation *will be adequate to the purposes of the clients in the light of their understanding of the nature of the representation that is necessarily implied by each client's consent to the dual representation* after the disclosure to each of how the duality of the representation will affect the lawyer's performance. While, in view of what we have said above, we believe it may not be wise for the clients to consent to the dual representation . . . , we cannot say it would be unethical under the canons. We would simply note that in informing their clients and obtaining their consent, the lawyers should stress the now unanticipated difficulties that may arise along the way and may prompt one or the other client to decide to change counsel, and the emotional wear-and-tear and additional legal expense such a decision may involve. (Emphasis in original.)

In neither Opinion 49 nor 54 was the obligation of a lawyer to represent a client zealously, as codified in DR 7-101, found to be a bar to joint representation. Though not articulated in either opinion, that fact is attributable to a recognition that clients may limit the objectives of a representation and that, once so-limited, a lawyer must limit his own zealous representation to those objectives. As provided in DR 7-101(A)(1), "A lawyer shall not intentionally fail to seek the lawful *objectives of his client* through reasonably available means. . ." (emphasis added). Thus, if clients make clear that their only objective is that an agreement they have already reached be effectuated, the disciplinary rules create no obligation that a lawyer represent or counsel one or the other of the clients as to other matters or objectives beyond the scope of that for which he is retained.

The crucial principle articulated in Opinions 49 and 54, which limits the obligations imposed by DR 7-101, is that where no actual conflict has yet arisen or is foreseeable, subpart (C) of DR 5-105 permits the prospective clients, after full disclosure of all relevant facts and potential disadvantages, to exercise *their* judgment that, notwithstanding those potential difficulties, joint representation for the limited purpose of seeking limited objectives is adequate to *their* purposes. Opinion 54 also concludes that this principle is controlling even in a situation in which "an adversary role is contemplated," as well as where the lawyer is only expected to be an "adviser, negotiator or scrivener."

In our view, the principle followed in Opinions 49 and 54 also applies to the facts now presented. We recognize that the issues and antagonisms involved in a divorce proceeding almost always exceed the potential conflicts involved in joint representation of business interests or commercial litigants. For that reason, we have no doubt that joint representation of a husband and wife seeking divorce is usually ethically improper. Nevertheless, there

may be some rare cases, such as the one before us, in which such conflicts do not exist. In those rare cases we believe that the affirmative obligation embodied in Canon 2 that a lawyer "make legal counsel available" precludes us from taking the paternalistic position that the public may not have a form of representation made available to it which apparently some members of the public desire.[1]

True, members of the public do not always make wise decisions, and perhaps it would be in their respective interests if all persons seeking divorce obtained separate counsel. However, in our view, it is not the role of this committee to weigh the mere desirability of one form of representation against another. Consistent with the affirmative obligation stated in Canon 2, we can only impose an absolute bar to a form of representation sought by at least some members of the public if we determine that it is so fraught with actual and potential conflicts as to be inherently unethical in all circumstances. It is for that reason, on the special facts before us, that we conclude that joint representation is not absolutely precluded in this case.

It is possible that both the spouses seeking joint representation in this case have concluded independently that such joint representation is "adequate to [their] purposes." They may have reached that conclusion because of a desire for expedition, efficiency, minimum expense, to avoid rancor or for some other reasons. If that is so, and each potential client has reached that conclusion exercising his and her individual judgment, free of coercion and with full knowledge of the limitations of such representation, and no existing conflicts as to the objectives of the representation exist, a lawyer should not be barred from providing joint representation to members of the public who want it.

We do not anticipate that this standard will be met easily or often. For example, in our view a lawyer could not provide joint representation where he or she has represented one of the two parties previously and has become informed of client confidences or secrets potentially relevant to the divorce proceeding which he would not be in a position to disclose to the other client. Loyalty to each client requires that a lawyer not put himself in a position where anything learned from one client must be held back from the other. Even where no client confidences have been conveyed, the lawyer should inform each client if he has ever represented the other so that each client may be his or her own judge as to whether the lawyer is in a position to provide undivided loyalty.

Similarly, we believe that special precaution is called for in a divorce situation to make sure that each client consenting to joint representation fully understands the limitations of the representation and that consent is both informed and uncoerced. It is possible that one spouse exercised some form of coercion over the other prior to seeking joint representation or that one spouse is less well-informed than the other as to the issues to be considered and the possible consequences of various dispositions of those issues. Therefore, the lawyer must affirmatively caution each potential client that consent to joint representation will disable the lawyer from providing either client with separate or confidential advice with respect to a number of issues that one or the other may not have considered.

In addition, in order to assure that this caution is understood, the lawyer must explain to each potential client that there are many issues that often arise in many divorce cases that he will *not* be able to provide separate representation if joint representation is undertaken, including, for example, issues of division of assets, custody of children, individual tax considerations, sequestration of assets, potential rights to pension benefits and the like. Moreover, it is not sufficient that a lawyer simply list a number of issues that he will not consider; it is imperative that the potential clients be given enough information as to assure that they understand the significance of the advice as to separate issues of which they will be deprived.

In essence, each client must be brought to understand that joint representation will, in effect, reduce the lawyer's role to that of a scrivener and expeditor of the procedural process and little more. Each must also be made aware that a lawyer retained to represent both husband and wife can provide separate representation to neither, and if a conflict should arise at some point in the representation, the lawyer would have to withdraw as counsel to both. Because the risk that a disabling conflict will arise is particularly acute in divorce proceedings, the lawyer must also emphasize "the emotional wear-and-tear and additional legal expense" likely to occur if a conflict requiring termination of the joint representation should surface and both parties are forced to retain new and separate counsel. Opinion 54, *supra.*

Finally, particularly in divorce proceedings, we believe that such disclosure must be made separately to each of the potential clients before the joint representation is undertaken. Such separate disclosure is necessary so that both the lawyer and each of his prospective clients can be assured that joint representation is in fact adequate to the purposes of each and that either client is consenting to such representation because of coercion of any kind.

We recognize that the standards stated in this opinion will preclude joint representation in almost all divorce proceedings. We believe that fact to be inevitable given that it is usually a fundamental conflict of interest that leads married couples to seek a divorce. Thus, it is unsurprising that it is a rare divorce case in which such a couple can use the same lawyer without some conflict arising. However, consistent with Canon 2, we cannot conclude that such representation is absolutely forbidden on the special facts presented to us if the "purpose of the representation" is strictly limited and both clients provide informed and uncoerced consent to such limited representation.

Inquiry No. 83-11-30
Adopted November 13, 1984

Dissenting Opinion of Two Members

The majority concludes that a lawyer may represent both the husband and wife in an uncontested divorce if the parties have agreed between themselves upon a division of their property and all other substantial terms and if both parties consent to the joint representation after full

[1]We are aware that the subject of joint representation in divorce-related proceedings has become a controversial topic and that numerous articles have been written advocating one or another type of representation as the most desirable in various circumstances. *See, e.g.*, Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 29 J. Fam. L. 615-53 (Aug. 1981); Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 Fam. L. Q. 107-45 (Sum. 1982); Crouch, *Divorce Mediation and Legal Ethics*, 16 Fam. L. Q. 219-50 (Fall 1982. We are also mindful that there appears to be no agreement in other jurisdictions on the subject. Some bars have permitted joint representation in at least some situations, and others have concluded that joint representation of a couple seeking divorce should never be permitted. *See, e.g.*, Klemm v. Superior Court, 142 Cal. Rptr. 509 (Cal. App. 1977) (joint representation permitted in "no fault" divorce proceeding); Halvorsen v. Halvorsen, 479 P.2d 161 (Wash. App. 1970) (joint representation permitted); Colorado Ethics Committee Opinion No. 47 (1972) (joint representation permitted if no actual conflict); Arizona Opinion No. 76-25 (1976) (dual representation permitted); Oregon Opinion No. 218 (1972) (counsel may draft agreement for both parties but may only appear in formal proceedings on behalf of one); Virginia Opinion No. 296 (1977) (same as Oregon); Ohio Opinion No. 30 (1975) (need for confidentiality and loyalty precludes joint representation); New York State Bar Opinion No. 258 (1972) (joint representation disapproved); West Virginia Opinion 77-7 (1977) (joint representation disapproved); Maryland Opinion No. 80-55A (1980) (joint representations disapproved). The Model Rules of Professional Conduct adopted by the ABA House of Delegates on August 2, 1983, address this subject no more explicitly than the existing DR 5-105. *See* Model Rules 1.7, 2.1 and 2.2.

disclosure of its limitations and possible pitfalls is made. We believe that, because of the conflict inherent in divorce, joint representation is never permissible.

By definition, there has been sufficient conflict or at least disagreement between the parties to bring them to the point of divorce. We do not believe that an attorney in this situation can properly discharge his professional obligations if he represents both divorcing individuals. Even in an uncontested divorce, the unavoidable presence of differing interests requires that both individuals should be required to have separate counsel.

The majority acknowledges that joint representation is fraught with peril. As it notes, this Committee has previously recognized the likelihood that an attorney's independent judgment will be affected when he attempts to represent two corporations in their business dealings with one another. *See* Opinion No. 49. And, although, Opinion No. 49, as well as Opinion No. 54 and ABA Informal Opinions Nos. 518 and 643, permit joint representation, those opinions deal only with business transactions involving corporations, banks and municipalities, not personal transactions involving people who may not be sophisticated as to their legal rights.

This opinion deals with a divorce between two individuals, something that cannot be viewed simply as two companies that have chosen to stop doing business with one another. We think conflict is inherently present in divorce. *See, e.g.*, N.Y. State Bar Opinion No. 258 ("Because there is such a substantial likelihood of prejudice or profound conflict inherent in every matrimonial problem, we do not believe that adequate representation of both parties could be had should a lawyer undertake to represent both husband and wife.")

Consequently, we disagree that the parties can nonetheless consent to dual representation after full disclosure if they determine it is only a scrivener and expediter they want. Divorce proceedings require an attorney to play a greater role in an advisor capacity. At a minimum, an attorney should be advising his clients as to that client's full range of options, including those unpalatable to the other party, and should be in a position to act as an advocate should that later become necessary. This an attorney cannot do if he represents both parties.

Divorce cases often involve great emotion and often the individuals have difficulty in rationally analyzing their own positions. Even in a relatively amicable divorce, emotion has to be involved, if only during the time a couple decides to divorce and before they reach the attorney's office with their agreement. The attorney, even in the amicable divorce situation, still is obligated under the Code to determine whether the arrangements made by the parties before they contacted him are best and fair for each one, and not the product of coercion or ignorance. Both DR 7-101 and the ethical considerations under it are directed towards that end. *See* EC 7-1 which states in part that, "The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits."

Under the majority's view, an attorney would be precluded from reviewing the adequacy of a divorcing couple's agreement or from determining that neither party was coerced into signing it. The attorney further would be precluded from determining whether the agreement accurately reflects the desires of the parties or whether it best protects the legal rights of each party. Such a narrow view of the attorney's role violates his obligation under DR 7-101(A) to represent his client zealously. How can an attorney so represent a client when his role has been relegated to that of a scribe?[1] To argue, as the majority does, that there is no violation of DR 7-101 because the clients have chosen to limit the attorney's role is to ignore the realities of divorce.

There is also the danger that the attorney, although purporting to represent both spouses, may in fact have a closer relationship with one spouse. For example, in *Ismael* v. *Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966), the wife signed a property settlement that her husband's attorney drafted, accepting a settlement of $8,807, but surrendering her right to community assets totaling $82,500. In the ensuing malpractice action against the husband's attorney, the attorney stated that he "assumed that [the wife] knew what she was doing" and that he believed that the property settlement was "cut and dried" between the husband and wife.[2] It is precisely this type of overreaching and ignorance of legal rights that is prevented by completely barring joint representation in divorce proceedings.

[1]This opinion does not preclude the parties from agreeing that one attorney has primary responsibility for preparing all necessary documents after each spouse has been advised separately by his/her own counsel.

[2]As this case demonstrates, there also is an increased risk of malpractice being alleged by one spouse or the other where one attorney attempts to represent both divorcing spouses.

The majority assumes a reduced expense from hiring only one attorney and points to this as a reason why divorcing spouses might prefer joint representation. We question whether there will be any significant savings. An attorney who represents both spouses will likely charge more for representing two clients than he would have charged for representing only one. Even if two attorneys are involved, where the divorce is uncontested and relatively little work has to be done by either attorney, the incremental cost of having two attorneys is likely to be modest. In any event, the possibility of savings is not sufficient to outweigh the unacceptability of the basic conflict.

Further, an attorney, faced with the possibility of representing two clients rather than one, might be insufficently vigilant in his initial duty to inform both clients of the limitations and possible pitfalls of joint representation. This temptation would be even greater if the attorney is paid by only one of the parties and the attorney hopes to continue representing that party (or both parties) in the future. The attorney's explanation, too, might become routine over time so that the clients fail to recognize its importance.

Finally, ECs 5-14 and 5-15 warn about the possible impairment of judgment and dilution of loyalty that accompanies multiple representation. Advising the attorney to scrutinize these situations carefully, EC 5-15 states in part that:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. *He should resolve all doubts against the propriety of the representation.* (Emphasis added.)

Doubts are always raised whenever an attorney is asked to represent both a husband and a wife in an action to dissolve their marriage. The temptation to favor one client over the other, however unconsciously, always exists, and even without partiality, the inability to represent the interests of each to the utmost is inherent. Because of the harm that can result from favoring one client or believing that the parties have worked things out between themselves, we think it necessary that both parties be represented by separate counsel.

The majority states that this Committee can bar joint representation "only if we determine that it is so fraught with actual and potential conflicts as to be inherently

unethical." We believe that divorce presents exactly that situation.

Opinion No. 144

Withdrawal from CJA Case

- An attorney who seeks and accepts appointment under the District of Columbia Criminal Justice Act to a case that may be assigned to a certain judge who regularly declines to grant excess compensation may not ethically withdraw from the case if it is in fact assigned to that judge.

Applicable Code Provisions

- **DR 2-110(B)** (Mandatory Withdrawal)
- **DR 2-110(C)** (Permissive Withdrawal)
- **DR 5-101(A)** (Declining Employment Where Professional Judgment Would Be Affected by Attorney's Own Financial Interest)
- **DR 6-101(A)(2)** Adequate Preparation Required)
- **DR 7-101** (Zealous Representation of Client)

Inquiry

Inquirer has a substantial practice under the District of Columbia Criminal Justice Act ("CJA"). He seeks an opinion regarding his ethical duty to remain in a CJA case once he learns that a particular judge (hereafter "Judge X") is assigned to the case. According to inquirer, Judge X, who previously has presided over several of inquirer's CJA felony trials, has "repeatedly refused, both orally and in writing, to authorize compensation in excess of the statutory limit."

Inquirer believes he has three possible alternatives: (1) to prepare inadequately for trial; (2) to move to withdraw as soon as he is notified that Judge X will preside; or (3) to prepare adequately, even though he will not be compensated fully and therefore will "work in part, for free."

Inquirer views the second alternative, withdrawal, as the "most appropriate action" because he "simply could not hope to exercise [his] unimpaired judgment. . . and prepare to the extent necessary where. . . [he] would not be paid for [his] time." He notes that his "enthusiasm and subsequent efforts would have to be effected [sic] by the knowledge that it was unintentionally pro bono activity." Citing DR 5-101(A), which permits an attorney to decline employment where his professional judgment would be affected by his own financial interest, inquirer seeks confirmation that withdrawal is the only ethical option available to him.

Discussion

To place inquirer's question in context, we begin with a brief review of the District of Columbia CJA program. We then analyze inquirer's ethical responsibilities in the circumstances presented.

A. The District of Columbia Criminal Justice Act

The District of Columbia Criminal Justice Act is codified in Title II, Chapter 26, of the D.C. Code, Sections 11-2601–11-2608. In brief, an attorney wishing to undertake CJA cases makes application to the Superior Court for appointment by order of that Court. D.C. Code §11-2602. An attorney desiring to withdraw from a CJA case must obtain another order from the Court that substitutes another attorney in his or her stead. D.C. Code § 11-2603. The Court may make a substitution only where it is "in the interest of justice." *Id.*

Section 11-2604(a) of the Act provides for an hourly rate not to exceed $35 per hour, plus reimbursement for reasonably incurred expenses. Section 11-2604(b) limits compensation to the following maximum amounts:

(1) $900 for misdemeanor cases;
(2) $1,700 for felony cases; and
(3) $900 for post-trial matters if the underlying case was a misdemeanor, or $1,700 for post-trial matters if the underlying case was a felony.

Section 11-2604(c) allows compensation in excess of the maximum amounts "for extended or complex representation whenever such payment is necessary to provide fair compensation." An attorney seeking additional compensation must make a request to the presiding judge, who then may forward a recommendation for additional compensation to the Chief Judge of the Superior Court, whose approval is required.

B. Analysis of Inquirer's Alternatives

1. Inquirer Cannot Remain In The Case And Prepare Inadequately

We can easily dismiss any notion that an attorney could remain in a case but prepares inadequately. Inquirer himself notes that this alternative "is out of the question" and would be "in violation of every ethical standard." We agree. DR 6-101(A)(2) requires that a lawyer not "[h]andle a legal matter without preparation adequate in the circumstances."

Moreover, the Supreme Court has held that, under the federal Criminal Justice Act, 18 U.S.C. § 3006A, "defense counsel who is appointed by the Court. . . has exactly the same duties and responsibilities as the highly paid, paid-in-advance criminal defense lawyer." *Ferri* v. *Ackerman*, 444 U.S. 1983, 200, n. 17 (1979). This Committee expressed similar sentiments in Opinion No. 104, where it observed that DR 7-101, which requires a lawyer to represent his clients "zealously," imposes on an indigent's counsel "a similar duty of diligence and vigorous representation" as owed by counsel to a wealthy client.

In sum, as inquirer agrees, the first option is no option at all.

2. After Accepting Appointment Knowing That Judge X May Be Assigned To The Case, Inquirer Cannot Then Ethically Seek To Withdraw If Judge X Is Appointed

DR 5-101(A) provides that:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be *or reasonably may be* affected by his own financial, business, property, or personal interest. (Emphasis added.)

This provision clearly prevents an attorney from accepting employment, without the client's consent, where the attorney's financial interests will impair, or "reasonably" may impair, his professional judgment. Thus, *before* he accepts a CJA case, inquirer must determine whether the assignment of Judge X, a circumstance that "reasonably" might occur, would affect his judgment. Once inquirer determines that he can proceed and accepts the appointment knowing that Judge X may well be assigned to his case, DR 5-101(A) should be read to impose an ethical duty to remain in this case even if Judge X does in fact preside over the case.

As noted, DR 6-101(A)(2) and DR 7-101 require that inquirer's preparation be "adequate" in the circumstances and that he "zealously" represent his client. Frankly, we are not impressed by inquirer's contention that he must withdraw because he will not represent his client "adequately" and thus will violate a disciplinary rule. *See* DR 2-110(B) and (C). Once inquirer undertakes a CJA case and thus the responsibility of adequate, zealous representation, this contention, at least in the circumstances presented, is not available to him.

DR 2-110(B) and (C) also demonstrate that withdrawal would be improper. These rules allow withdrawal *only* where the limited circumstances there specified are in fact present. Significantly, DR 2-110(B) and (C) do not provide that assignment of a judge likely to be hostile to an attorney's

interests is reason to withdraw. To the contrary, the ethical considerations that give guidance for the rules' interpretation indicate that such a circumstance is *not* a valid reason for withdrawal under these rules, and we so hold.

EC 2-32 states that "[a] decision by a lawyer to withdraw should be made only on the basis of compelling circumstances. . . ." Similarly, EC 2-29 provides that, "[w]hen a lawyer is appointed by a court. . .to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except by compelling reasons. Compelling reasons do not include such factors as. . .the identity. . .of a person involved in the case." EC 2-28 states that "[t]he personal preference of a lawyer to avoid adversary alignment against judges. . .does not justify his rejection of tendered employment." EC 2-31 declares that "[f]ull availability of legal counsel requires. . .that lawyers who undertake representation complete the work involved." These various ethical considerations reflect the admonition in Canon 2 that "[a] lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." Moreover, several decisions have concluded that an attorney who accepts employment as counsel in a criminal case impliedly stipulates that he will represent his client in the matter until conclusion. *See, e.g.*, *United States* v. *Ramey*, 559 F. Supp. 60, 62 (D. Tenn. 1981); *United States* v. *Maines*, 462 F. Supp. 15, 16 (D. Tenn. 1978).

These principles have particular import regarding the CJA system, which was established in part to make the criminal justice system work for indigents. Canon 8 provides that "[a] lawyer should assist in improving the legal system." EC 8-3 states that "[t]he fair administration of justice requires the availability of competent lawyers" and that "[t]hose persons unable to pay for legal services should be provided needed services." A lawyer who accepts CJA cases does so knowing that he assumes various duties that may be quite time-consuming.

Case law indicates that the fact that Judge X may deny inquirer's requests for excess compensation does not justify withdrawal. While "[j]ustifiable cause for an attorney's withdrawal includes the failure or refusal of a client to pay or secure the proper fees or expenses of the attorney after being reasonably requested to do so,"[1] the inquiring attorney here will be paid a "proper fee" as determined by the statute and the court.[2] In *Kriegsman* v. *Kriegsman*, 375 A.2d 1253, 1256 (N.J. Sup. Ct. 1977) the court said:

> [A]n attorney has certain obligations and duties to a client once representation is undertaken. These obligations do not evaporate because the case becomes more complicated or the work more arduous or the retainer not as profitable as first contemplated or imagined. *Cf. Suffolk Roadways, Inc.* v. *Minuse*, 56 Misc. 2d 6, 287 N.Y.S.2d 965, 969-70 (Sup. Ct. 1968).[3]

Following our normal practice, we do not render an opinion on the *legal* obligations an attorney may have to continue representation once he has signified his willingness to take a CJA case. We do note, however, that DR 2-109 requires that, "[i]f permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission." Thus, the manner in which the Superior Court views an attorney's legal obligations under the CJA may be relevant to his ethical obligations. It may well be that Judge X, if fully apprised of inquirer's reason to withdraw, would not rule that "the interest of justice" allows inquirer to quit the case. *See* D.C. Code § 11-2603.

For the above reasons, we conclude that inquirer may not ethically withdraw from a District of Columbia CJA case simply because Judge X, who may deny additional compensation, is assigned the matter.

Inquiry No. 84-1-4
Adopted December 11, 1984

[1]*See Jacobs* v. *Pendel*, 236 A.2d 888, 890 (N.J. Sup. Ct. 1967) *and cases cited.*

[2]An attorney accepts CJA assignments knowing that compensation terms are set by statute and that "judicial discretion. . .determine[s] a claim" for additional compensation. *Thompson* v. *District of Columbia*, 407 A.2d 678, 681 (D.C. App. 1979). The Act itself provides that an attorney will receive excess compensation "for extended or complex representation" only when the court in its discretion approves such compensation. D.C. Code § 11-2604.

[3]In our Opinion No. 104, we held that "[t]he Code expects the lawyer to provide some *pro bono* representation to indigents."

Opinion No. 145

Propriety of Letter of Solicitation and Division of Fees

• This opinion relates to a letter sent from one law firm to others suggesting "association" with the soliciting firm in areas of law in which that firm specializes. The inquirer asks whether the terms of the letter constitute an offer to pay a commission for referred legal work in violation of the District of Columbia Disciplinary Rules. The Disciplinary Rules in effect in the District of Columbia both prohibit compensation or reward for recommending a lawyer's employment by a client and regulate the division of fees between lawyers. We conclude that the letter on its face does not violate either of these rules.

• In addition, we observe that questions do arise concerning the manner in which the practices described in the letter are actually implemented, and we stress that caution should be exercised in such arrangements to ensure that in practice they adhere to the requirements of the Disciplinary Rules.

Applicable Code Provisions

• **DR 2-103(C)** (A Lawyer Shall Not Compensate Or Give Anything Of Value To A Person Or Organization To. . . Secure His Or Her Employment. . .)

• **DR 2-107(A)(2)** (A Lawyer Shall Not Divide A Fee For Legal Services With Another Lawyer. . .Unless. . .The Division Is Made In Proportion To The Services Performed And Responsibility Assumed By Each)

Inquiry

The letter at issue in pertinent part states:

> Our firm specializes in all matters relating to patent trademark and copyright law. We are now expanding our practice by increasing our association with a select number of law firms. If you choose to associate with our firm in those areas of law in which we specialize, we will pay to you an associate's fee based upon the amount of work you perform in a given case. For example, our fee for filing and prosecuting a patent application is approximately $1,500.00 of which our associates typically receive 25 percent.
>
> No specialized knowledge is required of our associates regarding patents, trademarks and copyrights. The enclosed forms are self-explanatory and complete. Your associate duties will consist of

assisting the clients in completing the enclosed forms and in maintaining client contact. Upon completing the appropriate form, please forward it to our mailing address. After our attorneys review the form, we will contact you concerning the appropriate fee for the work desired by your clients, as well as to any additional information which may be required.

The "associate" duties are delineated as "assisting the clients in completing the enclosed forms" and "maintaining client contact." The fee to the "associate" is stated as based upon the amount of work performed. An example is given of a typical fee of 25 percent of the total fee charged for a patent application.

Discussion

DR 2-103(C) of the District of Columbia Code of Professional Responsibility sets forth the general principle that a lawyer shall not compensate or reward another for recommending the lawyer's employment by a client.[1] The exceptions to this principle for referral services are not at issue in the present inquiry.

DR 2-107(A) prohibits the division of fees for legal services unless the client consents after full disclosure, the division is made in proportion to the services performed and the responsibility assumed by each, and the total fee is not clearly unreasonable.[2] Read together, these disciplinary rules provide for compensation to recommending attorneys or firms only if, after consent of the client, they perform some of the actual work done, their compensation is in proportion to the services performed and the responsibilities assumed, and the total fee is not clearly unreasonable.

We do not find that the text of the letter at issue describes an arrangement which would necessarily violate these disciplinary rules.[3] On its face, the offer made in the letter does not suggest compensation to attorneys merely because of their recommendations of employment. Rather, according to the letter, attorneys will also perform work on behalf of the clients by "assisting the clients in completing the enclosed forms" and "maintaining client contact." In fact, the letter states expressly that the associate's fee is based upon the amount of work performed.

The question remains, however, whether the particular fee arrangement at issue runs afoul of DR 2-107(A). We have previously determined that a division of fees on the basis of a flat percentage, rather than in proportion to the work performed, is proscribed. Our Opinion 109 held that a local attorney's payment to a referring attorney of 20 percent of the legal fees generated by that attorney's referrals would not be permitted because "a flat 20 percent of every fee would not be in proportion to the services performed and responsibility assumed by each lawyer." Similarly, we determined in Opinion 65 that a signed agreement between an attorney and his law firm, requiring him in the event of a termination of his employment to pay 40 percent of his net billings to the firm received from clients of the firm for services performed, violated DR 2-107(A)(2), among other disciplinary rules. The basis of the opinion was that there was "no provision for assuring a division of fees in proportion to services performed and responsibility assumed." Moreover, the existing provision did not "appear to contemplate performance of any continuing services by the former law firm of the withdrawing attorney."[4]

In this instance, however, a flat percentage has not been guaranteed on the face of the letter. The letter designates the compensation of 25 percent of the fee as that "typically" received, and also states that the money paid will be based upon the amount of work performed.

Further, we cannot assume that the percentage identified as "typical" is an unreasonable estimate for the portion of the work usually performed by the associated attorney. Without knowing more about the time needed to perform the delineated duties and the responsibility shouldered by the attorney, approximately 25 percent of the collected fee is not necessarily unreasonable. *See* ABA Formal Opinion 204, which, on a related issue, cautions against hasty judgments on the reasonableness of fees.

Nonetheless, we would be remiss if we failed to comment that, although we do not find any *per se* violation of the applicable disciplinary rules, there are dangers in the practices suggested by the letter. Such practices should be conducted with all due caution and ethical standards in mind. The associated attorneys must, in fact, perform services. In practice, the amount paid must be in proportion to the services rendered and not merely be payment for a referral. Further, according to DR 2-107(A)(2), the client must also be made fully aware of and have consented to the division of the fees. Finally, according to DR 2-107(A)(3), the fee must be reasonable for the legal services rendered to the client.

Inquiry No. 81-2-3
Adopted January 22, 1985

Opinion No. 146

Joint Enterprise By Lawyer and Non-Lawyer to Provide Services That Include Both Legal and Non-Legal Work

• A lawyer and a non-lawyer may not form a partnership or corporation to provide services that include legal work. However, where a lawyer and non-lawyer join together to perform non-legal services, the lawyer may also form a separate entity to provide legal services to the clients of the joint venture.

Applicable Code Provisions

• **DR 2-103(A) and (C)** (Solicitation of Professional Employment)
• **DR 3-102** (Dividing Fees With a Non-Lawyer)
• **DR 3-103** (Forming a Partnership With a Non-Lawyer)
• **DR 5-107(C)** (Avoiding Influence By Others Than the Client)

Inquiry

An attorney employed by a federal agency, who has developed substantial ex-

[1]DR 2-103A(C) states:
A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his or her employment by a lient, or as a reward for having made a recommendation resulting in his or her employment by a client, except that he or she may pay for public communciations permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service.

[2]DR 2-107(A) states:
A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
(2) The division is made in proportion to the services performed and responsibility assumed by each.
(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

[3]However, although the firm's letter seeks other firms which will "associate" with it, the "associate" relationship proposed in the firm's letter does not fall within the meaning of "associate" in the exemptive language of the first paragraph of DR 2-107(A). *See* ABA Formal Opinion 330 construing ABA DR 2-107(A) which is identical to D.C.DR2-107(A).

[4]*But see*, Formal Opinion 97 of the American Bar Association, which permitted an attorney to receive a percentage of the fees collected from former clients by a firm he was previously associated with because he directed the services to the clients, although most of his work was through correspondence.

pertise in the government procurement process, wishes to leave the government and form a partnership or professional corporation with a non-lawyer, who has substantial experience in legislative and executive agency lobbying, for the purpose of assisting clients who seek government contracts. The attorney anticipates that the bulk of the work of this contemplated enterprise will be non-legal and that the enterprise will in effect serve as a marketing representative for its clients. However, he believes that on occasion clients will require legal advice which he is particularly well-suited to provide. Since the inquirer is aware that DR 3-103 prohibits a lawyer from forming a partnership with a non-lawyer "if any of the activities of the partnership consist of the practice of law," he asks whether he may set up his own law practice to perform any legal work that clients of the partnership may require. He further asks whether his partnership agreement with the non-lawyer may provide that his compensation from the partnership will be reduced by whatever amount he derives from his legal representation of the partnership's clients.

Discussion

The Code of Professional Responsibility places a number of restrictions on collaboration between lawyers and non-lawyers in activities that in any way involve the practice of law. DR 3-102 prohibits lawyers from sharing legal fees with a non-lawyer. DR 3-103 forbids lawyers from forming a partnership with a non-lawyer "if any of the activities of the partnership consist of the practice of law." DR 5-107(C) proscribes lawyers from practicing in the form of a professional corporation or association if a non-lawyer owns an interest, is a corporate director or officer, or has the right to direct or control the professional judgment of the lawyer.

The policy rationales for these rules can be derived from the Canons and Ethical Considerations. Canon 3 exhorts lawyers to assist in preventing the unauthorized practice of law, and it appears that DR 3-102 and DR 3-103 were adopted to help to achieve this objective. EC 3-8 states: "Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with him."[1] *See* Opinion 52. Canon 5 provides that "[a] lawyer should exercise independent professional judgment on behalf of a client," and this appears to be the reason for DR 5-107(C). *See* EC 5-24. Another policy consideration is the lawyer's duty to preserve the confidences and secrets of his clients, DR 4-101, and the danger that they will be compromised if a lawyer joins with a non-lawyer in a business that includes the practice of law.

Despite the prohibitions on collaborative ventures between lawyers and non-lawyers, this Committee has recognized the benefits of making available professional services for which there is a market, consistent with the constraints imposed by the Code. In Opinion 10, the Committee held that lawyers and non-lawyers can work together to perform government contracts that "require both strictly legal work, which may not properly be performed by laymen, and other work which may...so long as (1) the services to be provided by non-lawyers are non-legal services; (2) to the extent that non-lawyers receive a portion of the fees to be paid, that portion pertains only to non-legal portions of the work performed; and (3) the legal services are not to be performed by a partnership which includes both lawyers and non-lawyers." In Opinion 93, the Committee concluded that lawyers may employ non-lawyers to provide non-legal services in conjunction with legal services, but may not form partnerships with non-lawyers to deliver the same combination of services.

In discussing the relevant Disciplinary Rules, the Committee has identified the fundamental policy underlying them: "[T]he ethical restrictions on collaborative enterprises involving both lawyers and non-lawyers are concerned only with preventing improper lay involvement in the professional activities of lawyers, and are not addressed to activities that do not constitute the practice of law, even if lawyers are in some manner involved in such activities." Opinion 93.

Applying these principles to the instant inquiry, we conclude that the arrangement proposed by the inquirer does not offend the Code. So long as a partnership composed of a lawyer and a non-lawyer does not render legal services, the joint enterprise does not violate the Disciplinary Rules. Similarly, the lawyer may open his own law practice to handle any legal work generated by the clients of the partnership so long as the lawyer maintains the independence of his professional judgment and the confidentiality of his client's secrets and confidences. The lawyer must be scrupulous to observe these restrictions, and he will be subject to discipline if he fails to do so. However, we do not think that the danger of abuse is so great that we must, as a prophylactic measure, condemn the proposed arrangement as inevitably leading to abuse.

Furthermore, the proposed fee arrangement satisfies DR 3-102. Although the lawyer's share of the proceeds from the partnership's non-legal work will be reduced by the amount of his legal fees, that arrangement does not result in a division of legal fees which the Code proscribes. It may be argued that the fee arrangement violates DR 2-103(C), which forbids a lawyer from compensating another person or organization for recommending or securing the lawyer's employment by a client, but we do not think this rule is applicable here. Since the lawyer is a principal of the joint enterprise which may be said to recommend his services, he is in effect recommending his own services, and such solicitation is permitted by DR 2-103(A), provided that it does not involve statements that are false, fraudulent, misleading or deceptive, or the use of undue influence.[2]

Inquiry No. 84-7-21
Adopted January 22, 1985

Opinion No. 147

Settlement Offers in Public Interest Litigation Conditional on Waiver of Statutory Fees

• An attorney representing a defendant in a Title VII action, or other action in which statutory attorneys' fees are provided, may not condition an offer of settlement upon an agreement by plaintiff's counsel to waive or limit the plaintiff's potential statutory fees.

[1]DR 3-101 provides that a lawyer (A) shall not assist a non-lawyer in the unauthorized practice of law and (B) shall not practice in any jurisdiction where to do so would violate that jurisdiction's regulations.

[2]The Committee notes its concern that the current prohibitions against lawyers and non-lawyers forming partnerships or professional corporations to provide a combination of legal and non-legal services may be overly restrictive. The essential policies, which we fully support, are that non-lawyers should not engage in legal work and that lawyers must maintain the independence of their professional judgment and the secrets and confidences of their clients. Protection of these interests, however, may not require a blanket prohibition against partnerships and professional corporations composed of both lawyers and non-lawyers. In view of this concern, the Committee ordinarily would consider recommending appropriate amendments to the Board of Governors and the Court of Appeals. However, a special committee of the Bar is presently conducting a comprehensive review of the Code in connection with the ABA's new Model Rules of Professional Conduct. Under these circumstances, we defer to that committee the question of whether the current prohibitions on partnerships between lawyers and nonlawyers should be modified.

- An attorney representing a defendant in a Title VII action, or another action in which statutory attorney's fees are provided, may offer a single sum in settlement of the claims against defendant for both damages and attorney's fees.
- The attorney representing a plaintiff in such a situation may, and in most instances should, but need not, transmit to his or her client an offer of settlement made by a defense attorney in violation of this opinion.

Applicable Code Provisions

- **DR 1-102(A)(5)** (Misconduct By Acting in a Matter Prejudicial to the Administration of Justice)
- **EC 2-25** (Regarding a Lawyer's Obligation to Support Programs that Provide Legal Services to Those Who Otherwise Might Not Have Them)
- **DR 2-108(B)** (Settlement Agreements Not to Restrict Attorney's Right to Practice Law)
- **DR 5-101(A); 5-103(A)** (Regarding the Limited Circumstances in Which a Lawyer Ethically Can Have a Personal Financial Interest in Litigation in Which He Is Representing a Party)
- **DR 5-103** (Avoiding Acquisition of Interest in Litigation)
- **DR 7-102** (Representing a Client Within the Bounds of the Law)
- **EC 7-14** (Regarding the Special Obligation of Government Attorneys to "Not Use...the Economic Power of the Government...to Bring About Unjust Settlements or Results")

Inquiry

Does a proposal for settlement of a Title VII action on condition that plaintiff's attorney will waive or accept a reduced statutory fee violate the Code of Professional Responsibility?

Discussion

Introduction

In the past three years, the Committee has had a number of inquiries regarding whether in Title VII litigation defense counsel, or counsel for the plaintiff, violate the Code of Professional Responsibility by discussing a settlement of the action that will involve an agreement by plaintiff's counsel to waive or accept a reduced award of potential statutory attorneys' fees and/or costs.

Background

Title VII (as well as other Federal legislation) provides that reasonable attorneys' fees will be awarded prevailing plaintiffs. 42 U.S.C. § 20003-5(k).[1] The purpose of these attorneys' fee provisions is to encourage enforcement of the rights protected by the statute by persons who would otherwise be unwilling or unable to bear the cost of doing so. These statutes also have been interpreted to permit an award of attorneys' fees upon a settlement.[2]

There is a practice in some government agencies, and also in private Title VII litigation, for defense counsel to offer to settle such litigation upon the condition that the plaintiff (and his or her attorney) will waive completely, or not seek more than a stipulated amount of, the attorneys' fees or costs potentially recoverable under the statute.

The Ethical Considerations

I.

The question concerning the ethics of these particular conditional settlement offers is one that bears not only on the conduct of defense counsel who make such offers, but on the conduct of plaintiff's counsel who must decide what to do upon receiving such an offer.

The demand for a waiver of statutory counsel fees as a condition to settlement presents a severe dilemma for plaintiff's counsel. Plaintiff's counsel owes undivided loyalty to the client and is obliged to exercise his judgment in evaluating the settlement fee from the influence of his or her organization's interest in a fee. DR 5-101(A).

Frequently, however, plaintiff's counsel in civil rights litigation are employed by a public interest organization that, as a matter of public policy, does not accept fees from the client. In any event, plaintiffs in these cases often have no resources to pay a fee. In such cases, the plaintiff's waiver of attorneys' fees affects only the lawyers and their organizations, who depend entirely on the statute for their fee; the client, who is not obligated or is unable to pay the fees, has no stake in the statutory fee and hence is not affected by its waiver.

Because of this, an offer of settlement providing substantive terms that are favorable for the plaintiff, but conditioned upon the waiver or reduction of fees, can put plaintiff's counsel into a position in conflict with his or her client. Defense counsel thus are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: They make a demand for a benefit that the plaintiff's lawyer cannot resist as a matter of ethics and one in which the plaintiff has no interest and therefore will not resist.

The Committee believes that it is unethical for defense counsel to exploit this situation in cases arising under statutes that authorize the award of fees to a prevailing plaintiff. Authorization of fee awards under such statutes is critical to the administration of justice; indeed, it appears critical to the perception of justice and its accessibility to all members of the society. In the civil rights and civil liberties areas, the statutory fee award is a concrete recognition that the protections of minorities against invidious discrimination or abuse by arbitrary governmental action are often meaningless unless counsel can be secured to assist in the enforcement of those rights, and that, typically, victims of such conduct are unable to afford counsel. Offers of settlement that are conditioned on plaintiff's counsel waiving such statutory fees could seriously undermine the effectiveness of these provisions as a device for making counsel available to persons having claims under these statutes.

DR 1-102(A)(5) provides:

(A). A lawyer shall not:

(5). Engage in conduct that is prejudicial to the administration of justice.

Moreover, under the Code of Professional Responsibility every lawyer is urged to support efforts to make counsel available to those unable to afford it. EC 2-25 states:

> The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession.

[1] *See also*, 20 U.S.C. § 1617 (Education Amendments of 1972) (action charging state or local education agency with discrimination); 42 U.S.C. § 19731(e) (Voting Rights Act); 42 U.S.C. § 2000- (a-j) (Civil Rights Act of 1967) (discrimination in public accommodations); 42 U.S.C. § 3612(c) (Fair Housing Act of 1968) (discrimination in the sale or rental of housing); 42 U.S.C. § 1988 (Civil Rights Attorney's Fees Award Act of 1976).

[2] In *Maher* v. *Gagne*, 448 U.S. 122 (1980), the Court held that counsel fees under 42 U.S.C. § 1988 may be awarded even after settlement of a plaintiff's claim or following a consent judgment. In either case, the plaintiff may be a "prevailing party" within the meaning of the statute.

Every lawyer should support all proper efforts to meet this need for legal services. (Emphasis added.)

The long-term effect of demands for the waiver of statutory fees is to prejudice a vital aspect of the administration of justice and, contrary to the obligations and aspirations of the Code of Professional Responsibility, undermines efforts to make counsel available to those who cannot afford it. Although this opinion is not limited to government counsel, we believe the considerations of EC 7-14 add additional force to our conclusion where government counsel is involved.[3]

The conclusion that conditioning an offer of settlement upon an agreement by plaintiffs' attorneys to waive or limit the amount of plaintiffs' statutory fees is unethical is also supported by the policy considerations reflected in DR 2-108(B) which provides that:

> in connection with the statement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

This Committee's prior Opinions 35 and 130, in another context, have noted that "DR 2-108(B) is an assurance of the public's right to counsel through the lawyer's right to practice." In Opinion 130 we found that insistence upon a settlement that restricts plaintiff's counsel's future practice was unethical. Agreements to waive or limit the statutory fees available obviously will have a detrimental impact upon counsel for plaintiffs in their willingness to represent persons in a Title VII litigation. While different in degree from a promise not to represent persons with similar claims, the present restriction is not different in kind from an absolute restriction upon the plaintiff's attorney and his future practice in the Title VII area. For this reason, DR 2-108(B) lends support to the conclusion that it is unethical to make an offer of settlement conditioned on such an agreement.

II.

On the other hand, the Committee is not prepared to find that offers of a single sum by a defendant in settlement of Title VII or other similar litigation is unethical. Society's interest in encouraging disposition of these and other cases through compromise, and a defendant's legitimate interest in defining his liability by settlement in lieu of trial, both require that this type of offer should be encouraged, not hindered. The obvious difficulty is that in many situations (reinstatement of the plaintiff's backpay, etc.), there is no way to avoid having an offer, if it is to fix the total cost to defendant to settle the case, that will involve an offer that *de facto* determines the plaintiffs' attorney's fees, too.

Despite the obvious limits to the usefulness of such a narrow determination, the Committee nonetheless is of the view that while single sum settlement offers are not unethical, demands for waiver of attorneys' fees or offers expressly conditioned on an agreement to waive or limit attorneys' fees violate the Code of Professional Responsibility. The Committee expresses no opinion regarding any settlement proposal formulations other than (1) single-sum proposals and (2) offers that expressly are conditioned on a waiver or reduction in plaintiff's statutory attorneys' fees.[4]

III.

The Committee is of the view that an attorney representing a plaintiff in an action of the type here under consideration who receives a settlement offer, even one in violation of the defense attorney's professional obligations, may discuss such an offer with his client, provided only that he make full disclosure (as required by DR 5-101(A)) of any conflict the offer creates. The Committee is of the view that, while in some instances plaintiff's counsel may not need to transmit to his client an offer he considers to be made in violation of his opponent's ethical responsibility, the general obligation to communicate all settlement offers that are communicated to him for consideration by his client includes even offers that expose the offering attorney to disciplinary action. Lastly, the Committee believes that a single-sum offer of settlement clearly does not give a plaintiff's lawyer an "interest in the cause of action or subject matter of litigation he is conducting" for his client, which is prohibited (with inapplicable exceptions) by DR 5-103(A).

Inquiry No. 82-8-11
Adopted January 22, 1985

Opinion No. 148

Attorney-Client Privilege Between Government Lawyer and Employee; Government Lawyers Serving As Both Witness and Advocate Against Employee; Government Lawyer's Obligation to Disclose Employee Wrongdoings

- An attorney in a government agency represents the agency, not its employees as individuals. Thus, while the normal attorney-client privilege exists between the attorney and the agency, there is no attorney-client privilege between the attorney and the individual employee when the attorney is serving as such to the agency. Unless the government lawyer is ethically and legally permitted to represent, and does represent, the government employee, the lawyer cannot give the employee legal advice (except the advice to obtain counsel), and the lawyer is ethically obligated to advise the employee that the lawyer does not represent the employee. Moreover, where the circumstances suggest an expectation of confidentiality by the employee, the lawyer should advise the employee that discussions between them are not privileged as to the agency.
- The facts of each situation will determine whether the Disciplinary Rules of the Code of Professional Responsibility are offended when the staff attorneys in a government agency serve as both witness and advocate in a proceeding against an employee who previously obtained legal advice in his or her official capacity from another attorney on the same staff. Generally, doubts should be resolved against anyone from the legal office serving as an attorney in a proceeding in which any other person from that legal office will also serve as a witness.
- An attorney in a government legal department or office may represent the agency in a contested proceeding even though the employee, who previously obtained legal advice from that attorney, will be a witness in that proceeding and will be cross-examined by the attorney.

[3]This is because of the special obligations of government counsel to deal fairly and not take undue advantage of his position to bring about unjust settlements or results. EC 7-14.

[4]The Committee views the existing law and Code of Professional Responsibility provisions as inadequate for resolution of more than the obvious questions. The problem involved here has been considered extensively in the Courts, in opinions of ethics committees of other jurisdictions, and even other parts of the District of Columbia legal and judicial structure. *See Jeff D.* v. *Evans*, 743 F.2d 648 (9th Cir. 1984) Advisory Opinion No. 30 of the State Disciplinary Board of the State Bar of Georgia, July 20, 1984; Opin. Nos. 80-94 and 82-80 of the Ethics Committee of the Association of the Bar of the City of New York; Report of the Subcommittee of Lawyer Members of the Committee on Attorney Fees appointed by the Chief Judges of the U.S. District Court and U.S. Court of Appeals for the District of Columbia, *Bar Report*, Aug/Sept 1984, pp. 4, *et seq.* The Committee hopes that the matter soon will receive full and deliberate consideration by the appropriate entities, so that the many important questions, too difficult to answer presently on the basis of the existing Code, can be resolved for the guidance of the entire Bar.

• A government lawyer has a fiduciary duty to the employing agency to inform agency management of contemplated or committed employee improprieties when the lawyer reasonably believes that improprieties did or are likely to occur that are not in the best interests of the agency or the public.

Applicable Code Provisions

• **DR 1-102(A)(4)** (Attorney Conduct Involving Deceit or Misrepresentation)
• **DR 4-101** (Preserving Client Confidences)
• **DR 5-101(B)** (Attorney as Witness)
• **DR 5-102** (Attorney as Witness)
• **DR 5-105 (B)** (Representing Clients of Differing Interests)
• **DR 7-104(A)(2)** (Advice to Person With Adverse Interest to Client)
• **EC 5-9**
• **EC 5-10**
• **EC 5-18**

Inquiry

A government agency has two separate offices of "in-house" counsel: one, Office A, represents and advises the Commissioners regarding the application of the agency's substantive regulations. The other, Office B, represents and provides legal advice to the agency regarding its daily operations and administration. The lawyers in Office B devote most of their time to providing legal services to assist agency employees, in their official capacities, in their administrative functions for the agency. In this context, the inquirer presents three questions concerning the relationship among the lawyers in Offices A and B and employees of the government agency.

The first question relates to a situation in which a lawyer in Office B provided legal advice to an agency employee pertaining to a document she was preparing as part of her official duty. During the course of this counseling, the lawyer reviewed the document and formed certain opinions about the employee's competence and knowledge. The employee also made certain gratuitous comments to the lawyer which were unrelated to the document the lawyer was asked to review. Moreover, the employee has stated repeatedly that she considers the lawyers in Office B to be "personally" assigned to her. Both in oral and written notices to the employee, the lawyers in Office B have defined their position as counsel for the agency, rather than counsel for individual employees.

In an administrative grievance filed by the employee against the agency, the employee alleged that her annual performance appraisal was arbitrary and inaccurate, and a hearing has been scheduled regarding the grievance. The lawyer in Office B, who previously advised the employee, has been asked to testify against her at the hearing regarding her competence. The agency is represented in this hearing by a lawyer in Office A. The inquirer seeks an opinion as to whether: (i) the lawyer in Office B may testify as to the quality of the employee's document; (ii) the lawyer may testify with respect to the content of the certain gratuitous comments made by the employee to the lawyer; (iii) the answer to (i) or (ii) depends upon who (as between the employer or the agency) initiated the proceeding; (iv) attorneys from Office B may represent the agency at the hearing if none of its attorneys will be witnesses; and (v) attorneys from Office B may represent the agency at the hearing if two (out of ten) attorneys in Office B will be witnesses.

The second question relates to a situation in which an employee, to which a lawyer in Office B has given legal advice, is called as a witness in an adversary proceeding between the agency and another employee. The inquirer seeks an opinion as to whether this lawyer, or any other lawyer in Office B, may cross-examine the witness-employee.

The third question arises if, in the course of representing the agency, the government lawyer learns from any source, including from an employee while providing legal advice to the employee, that the employee has committed or will commit an impropriety. The inquirer seeks an opinion as to whether the lawyer may or must alert agency management to the past or future improprieties.

Discussion

Several sections of the Code of Professional Responsibility have significant bearing upon these three questions. Because the threshold issue in all three questions is the attorney-client privilege, this analysis treats the privilege issue first.

I. *The Threshold Issue: Attorney-Client Privilege*

The inquirer did not describe the title or position of any of the government employees mentioned in the above facts. However, under the circumstances presented in this inquiry, it is probably unnecessary to differentiate between a higher level government "official" and any other government employee. *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981) (attorney-client privilege extends to communications between a corporate lawyer and a middle and lower-level employee made in the employee's official capacity when the lawyer is obtaining information or providing advice as part of rendering advice to the corporate client).

A lawyer who is employed by a government organization, department or agency represents the government rather than its employees as individuals. EC 5-18 of the Code of Professional Responsibility emphasizes that a lawyer "...employed or retained by a corporation or similar entity owes his allegiance to the entity and not to [an]...employee, or other person connected with the entity." The same result is true of a government agency, which is indistinguishable from a corporation for the purposes of EC 5-18.

Even though a government agency is a separate legal entity to which a lawyer owes allegiance, the agency cannot function except through its employees. Consequently, the government lawyer is inevitably in a position in which legal advice is sought by an employee concerning the employee's official duties. While this Committee and the federal courts have found instances where communications between the organization's lawyer and an individual employee have been sheltered by the attorney-client privilege from disclosure to third parties, these instances have been limited to circumstances where the lawyer, at the behest of the organization, communicates with the employee in order to represent the organization more effectively, and a third (outside) party seeks disclosure of the communications. For example, in *Upjohn Co.* v. *United States, supra*, the Supreme Court found that the attorney-client privilege existed to protect communications from disclosure to an outside third party where the communications at issue were made by corporate employees to an "in-house" lawyer at the direction of corporate superiors to facilitate legal advice for the corporate-client. Under the facts of this inquiry, on the other hand, the question is whether the organization itself is precluded from obtaining the communciations between its own attorney and its own employees. The lawyer would certainly be in a very awkward position if the Code were interpreted to prevent the lawyer from disclosing information to his or her client that was obtained while serving his or her client.

In Opinion 14, this Committee stated:

> ...joint representation [of a corporate officer and the corporation] is fraught with potential conflict and a lawyer should represent a corporate official in his *individual* capacity and

also represent the corporation only if the lawyer is convinced that differing interests are not presented.

Once conflicts or differing interests arise between the organization or agency and its employee, the lawyer's obligation to the organization is clear. The lawyer who represents a corporation, government agency or other organization serves in the same fiduciary capacity as the directors of a corporation. *Lane* v. *Chowning*, 610 F.2d 1385 (8th Cir. 1980); *Bryan* v. *Bartlett*, 435 F.2d 28, 37 (8th Cir. 1970). For example, in *Lane* v. *Chowning, supra*, a lawyer who represented a bank for forty years was permitted to participate in the removal of the plaintiff-executive from his position in the bank even though the lawyer previously provided legal advice to the executive during his term of office. The court found that the lawyer had a legal obligation, equal to that of the directors, to protect the bank and thereby represent it, even in an action to remove from office an executive who previously obtained legal advice from the lawyer while employed with the bank.

It is clear, therefore, that an employee's position within the organization or agency does not create an attorney-client relationship between the employee and a lawyer employed by the organization or agency. *U.S. Industries, Inc.* v. *Goldman*, 421 F.Supp. 7, 11 (S.D.N.Y. 1976). Thus, where a government or organizational lawyer provides legal advice to an employee which solely concerns the employee's official duty, no attorney-client relationship arises between the individual employee and the lawyer, and DR 4-101 (preservation of confidences and secrets of a client) does not benefit the employee. Consequently, communications between an employee and a government agency's "in-house" lawyer are not privileged against disclosure to the employer-government agency in any of the inquiries presented here. Having determined that there is no lawyer-client privilege in any of the three inquiries presented, we can now proceed to each inquiry.

II. *Appearance As Witness*

In the first inquiry, the attorney in Office B has formed opinions regarding the competence of an employee of the agency and is being asked to testify on the issue, where the agency is being represented at the hearing by Office A. Because there is no attorney-client privilege, the remaining issue is whether the attorney's testifying in the hearing presents a lawyer-as-witness problem.

A. Attorney as Witness and Advocate

Lawyers generally are prohibited from accepting or continuing employment when they or members of their firms will be called as witnesses in pending or contemplated litigation, and EC 5-10 indicates that doubts should be resolved "in favor of the lawyer testifying and against his becoming or continuing as an advocate." DR 5-101(B) states that an attorney may not accept employment in contemplated or pending litigation when it is obvious that he or she or another lawyer in the firm might be called as a witness in the same proceeding. Similarly, DR 5-102 requires withdrawal when a lawyer learns, or it is obvious, that he or she or another lawyer in the firm ought to be called as a witness in contemplated or pending litigation.

There are four exceptions enumerated in DR 5-101(B). The second and third exceptions permit an attorney to act as both witness and advocate where the testimony is not related to the substantive issues. These exceptions do not appear, from the description of facts in the inquiry, to be relevant here.

The first exception permits an attorney to act as both witness and advocate where the testimony relates to substantive issues on which there is no substantial dispute of fact. Unless the attorney is being asked to give opinions as an expert or employee competence, rather than merely the undisputed facts as to what an employee said, wrote, or did, this exception may eliminate the need for further analysis in many cases and permit Office B to represent the agency while the attorney from Office B is a witness.

If this exception is not applicable, then the issue is the fourth exception, which permits the lawyer to play dual roles as witness and advocate when the client would suffer substantial hardship if the rule were applied in a particular case.

In Opinion 44, we found it unnecessary to determine whether any of the above exceptions to DR 5-101(B) applied because Canon 5 was inapplicable where lawyers in a firm were representing a managing partner who would serve as a witness. We stated tht DR 5-101(B) and DR 5-102 prohibit only the acceptance or continuation of "employment in contemplated or pending litigation." Since the managing partner and lawyers were representing their own firm rather than an outside client, we stated the following:

> . . .It is our opinion that they [the firm's lawyers] have not been "employed" for the purpose of the pending litigation and that the quoted disciplinary rules [5-101(B) and 5-102] do not, therefore, apply. *The term "employment" typically refers to a service relationship between two distinct individuals or entities whose interests are not co-extensive.* Here, however, there is such an identity of interests between the firm and its own lawyers as to render the use of the term "employment" inappropriate. The proposed arrangement is in substance more properly viewed as analogous to pro se representation. This construction is consistent with both the interests underlying our strong societal interest in protecting the right to self-representation and the policies underlying the rules themselves. (Emphasis added)

Opinion 125 reaches the same result as to a law firm where the litigation relates to personal matters, rather than law firm matters, of the partners.

Contrary to a law firm, however, in which the attorneys are not hired for the purpose of repesenting the law firm, the attorneys in the government agency are hired specifically and solely to represent the agency. The question is whether, for this purpose, the in-house government attorneys more closely resemble the attorneys in a law firm or the outside attorneys retained by an organization.[1] In order to answer this question it is necessary to look at the reasons for the lawyer-as-witness restriction.

Two reasons for the restriction recognized the need to protect the client, as noted in ABA Formal Opinion 339 (1975) and EC 5-9. In particular, as noted in EC 5-9, the lawyer/witness "becomes more easily impeachable for interest and thus may be a less effective witness;" and as indicated in Opinion 125, "such a lawyer/witness will be in the unseemly position of arguing his or her own credibility." However, if client protection were the only basis for the restriction, there probably would be a provision for informed client waiver in DR 5-101(B) and DR 5-102(A), as there is, for example, in DR 5-101(A). Thus, although we decided in Opinion 44 that "the client can properly waive [the protection of this restriction]," that decision is limited to the facts of Opinion 44 (and Opinion 125), in which the client was a law firm.

[1]Whether the Department of Justice would constitute an exception to a general analysis of this issue is not asked or answered in this Opinion.

The third reason, also noted in EC 5-9, is not related to client protection and is presumably the basis for the absence of a waiver provision in DR 5-101(B)—"the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case." Moreover, EC 5-10 provides that "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate." Consistent with that resolution of doubts, DR 5-101(B) permits an exception to the lawyer-as-witness restriction only to prevent "substantial hardship on the client."

Under the circumstances presented in the inquiry, we believe that there generally would be no lawyer-as-witness problem where the lawyer from Office B will be the witness and the Office A lawyer will represent the agency at the hearing. This general result could, of course, be reversed if the relationship between Office A and Office B were institutionally so intimate as to make them indistinct for practical purposes. In either case, the outcome would not depend upon whether the proceeding were instituted by the agency or the disgruntled employee.

Conversely, if the lawyer from Office B were not going to be a witness, then Office B could represent the agency at the hearing (unless the lawyer had to be a witness in order for the agency's case to be presented properly, and the decision to keep the lawyer from testifying was made solely to facilitate representation by Office B).

Where two lawyers from Office B will be witnesses, however, then (assuming the second and third exceptions in DR 5-101(B) are not applicable) Office B should not represent the agency at the hearing unless either the first exception in DR 5-101(B)—the testimony will be uncontested—or the fourth exception in DR 5-101(B)—substantial hardship on the client—is applicable. The hardship determination must be made on a case-by-case basis, and cannot be made by the Committee based upon the facts presented in the inquiry. We would note, however, that the availability of Office A to provide the needed representation probably would decrease measurably the likelihood that Office B's withdrawal would create the necessary "substantial hardship."

B. Appearance of Impropriety

To assist the lawyer to avoid the appearance of an impropriety, the Committee must address the concern that the employee, viewing the agency's lawyer as the employee's attorney, may make disclosures with the expectation of confidentiality. Unless the lawyer intends to *represent* the employee (which the lawyer could do only if (a) the agency's interests and the employee's interests are not "likely" to conflict, pursuant to DR 5-105(B), and (b) the applicable statutes and regulations permit such representation), then the attorney would be precluded by DR 7-104(A)(2) from giving advice to the employee, other than the advice to secure counsel, if the interests of the employee "are or have a reasonable possibility of being in conflict with the interests of [the agency]."

In addition, if the attorney has reason to believe that the employee is making disclosure with an expectation of attorney-client confidentiality, then the attorney is ethically required by DR 1-102(A)(4)[2] to advise the employee that there is no such confidentiality as to the agency, lest the attorney be accused of deceitfully obtaining information from the employee. This conditional requirement to disclose the lack of confidentiality goes beyond, but is consistent with, the obligation that we found in Opinion 129 to disclose the identity and purpose of the client. Opinion 129 involves an individual's attorney interviewing employees of a defendant corporation where there is relatively little likelihood that the interviewed employees would or could reasonably expect confidentiality; in the present inquiry, on the other hand, the fact that the agency lawyer's function involves continual non-adversarial and advisory interchange with agency's employees would easily create an expectation of a personal attorney-client relationship and of confidentiality.

The extent to which these "warnings" should be given in each instance by an "in-house" government lawyer to an employee depends on the facts of the particular case. It appears from the facts of this inquiry that the government lawyers properly informed the employee, in writing, that they do not advise or represent employees personally, but they provide advice or representation to the employee in her official capacity solely for the purposes of properly representing or advising the agency. We recommend that this or an equally effective procedure be systematically employed, in conjunction with an oral warning of non-confidentiality, if the circumstances warrant, in order to avoid the appearance of impropriety.

[2]DR 1-102(A)(4) provides: "A lawyer shall not...[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

III. *Cross-Examination*

Regarding the inquiry as to whether the government lawyer who previously gave legal advice to an employee may represent the agency and cross-examine that employee in an administrative grievance proceeding filed by a second employee, we believe that, because the employee who obtains advice from the "in-house" government lawyer is not the "client," there is no attorney-client privilege, and such representation and cross-examination would not be improper under the circumstances of the inquiry. In the absence of the privilege, Canon 4 of the Code of Professional Responsibility, which requires lawyers to preserve the confidence and secrets of their clients, is inapplicable here.

However, we are concerned here, as in the first inquiry, with the appearance of impropriety encompassed in Canon 4 and its ethical underpinnings. Consequently, we suggest the systemization of the type of disclosures suggested in the first inquiry.

IV. *Duty to Disclose Improprieties*

Ethical Consideration 5-18 makes it clear that a government lawyer owes a fiduciary duty to the government as the client and not to an individual employee. It is equally apparent that if, in the process of giving legal advice or representing an employee in his or her official capacity, a government lawyer discovers that the employee has committed or intends to commit a wrongful act or fraud which may materially injure the organization, the lawyer may, and indeed must, make disclosure to the appropriate persons in agency management. For example, ABA Formal Opinion 202 found that a staff attorney in a trust company should make disclosures to the board of directors to enable the board to take such action as it deems necessary to protect the trust company from the wrongful acts of its executive officers. Because such a disclosure would actually be to the client, no violation of confidences or secrets would occur.

Under the facts represented in this inquiry, the nature or extent of the improprieties was not disclosed, and we therefore cannot make a determination as to the reasonableness of disclosing the employee's actions to the agency management. However, we agree with the holding in *United States* v. *AT&T*, 524 F.Supp. 1381, 1389 (D.C. Cir. 1981), that a government attorney may not only disclose the improprieties committed by a government executive to the agency management, but the lawyer may also testify to such action.

The caution noted in the other two inquiries about the appearance of impropriety would certainly be applicable here; if the attorney feels that the employee is preparing to "confess" or divulge incriminating information, the attorney should be particularly careful to advise the employee, in a timely manner, that any such disclosures will not be privileged as against the agency.

Inquiry No. 83-7-16
Adopted January 22, 1985

Opinion No. 149

Designation as an Attorney on Business Card or Stationery

• An attorney in a business that is not a law firm may identify himself as such on business cards or stationery of a business so long as the business is not, by its name or description, likely to be perceived as a law firm.

Applicable Code Provisions

• **DR 3-101(A)** (A Lawyer Shall Not Aid a Non-lawyer in the Unauthorized Practice of Law)

• **DR 2-102** (Professional Notices, Letterheads, and Offices)

Inquiry

May an attorney admitted to practice in the District of Columbia and employed by a non-District of Columbia business that identifies itself as "government and public affairs consultants" have business cards and stationery printed with "Esquire" or "Attorney at Law" following his name along with the business name, address, and phone number?

Discussion

DR 2-102 states that

> A lawyer...shall not use...a professional card,... letterhead, or a similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B)....

DR 2-101(B), in relevant parts, states that

> (B) Without limitation a false, fraudulent, misleading or deceptive statement or claim includes a statement or claim which:
> (1) Contains a material misrepresentation of fact;
> (2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
> * * *
> (6) Contains a representation or implication that it is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

DR 2-102(E) provides:

> Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his or her name, an earned degree or title derived therefrom indicating his or her training in the law.

The business card and stationery upon which the attorney's name and "Attorney" or "Esquire" would appear identify the firm as a governmental affairs consulting business. This avoids any reasonable likelihood that those who see the card or stationery would be misled into believing that the business with which the attorney is associated is itself a law firm.[1] In the absence of any risk that the firm would be perceived as a law firm, there is no violation of DR 2-101 or DR 2-102.

It also should be noted that DR 2-102(E) expressly indicates that "nothing contained herein shall prohibit a lawyer from using ...in connection with his or her name, an earned degree or title derived therefrom indicating his or her training in the law." The Committee interprets this to mean that the inquirer also would be free to put "LL.B" or "J.D." or a similar indication behind his name on a business card or letterhead of the kind being considered here.

Inquiry No. 83-7-17
Adopted February 19, 1985

Opinion No. 150

"Revolving Door": Substantially Related "Matters"

• A former government lawyer whose role in an administrative proceeding against a corporation while employed by a government agency was limited to an advisory capacity at the pre-complaint stage of the proceeding may later represent the corporation in a separate, private lawsuit brought by a customer against the corporation that may involve one or more of the same legal issues as the government proceeding if the former government lawyer did not gain access to any confidences or secrets of the government or any private entity while in government employ that could be used to the disadvantage of any party to the subsequent private action and the two proceedings are not otherwise substantially related and thus not the same "matter."

Applicable Code Provisions

• **DR 9-101(B)** (A Lawyer Shall Not Accept Private Employment with Any Matter in Which He or She Participated Personally and Substantially as a Public Employee)

• **Canon 9** (A Lawyer Should Avoid Even the Appearance of Professional Impropriety)

• **DR 4-101(B)(1), (2) & (3)** (A Lawyer Shall Not Reveal a Confidence or Secret of His Client, Use a Confidence or Secret of His Client to the Disadvantage of His Client or Use a Confidence or Secret of a Client for the Advantage of Himself or a Third Person Without Client Consent)

Inquiry

The inquirer is a law firm that employs a lawyer who previously was employed by a government regulatory agency as a legal advisor to one of its commissioners. As part of her duties, the lawyer reviewed staff proposals to the commissioners recommending institution of enforcement actions for violations of the federal statute enforced by the agency. A decision by the commissioners to commence an enforcement action is limited to a finding that the agency has sufficient evidence to constitute a *prima facie* showing of a violation; it is not a decision on the merits.

On behalf of the commissioner to whom she was assigned, the lawyer reviewed proposed enforcement actions against three separate corporations. The commissioners subsequently voted to bring administrative actions against each corporation. Once the agency voted to initiate the actions, the lawyer had no further involvement in any of the proceedings.

Subsequently, the lawyer left the government agency to work for the inquiring law firm. Prior to her employment, the firm undertook representation of one of the three corporations in the agency action instituted against it. Due to the lawyer's previous involvement in the government enforcement action, the law firm has screened her from any participation in the firm's representation of the corporation in

[1]The Committee notes that while the inquirer is a member of the District of Columbia Bar the conduct about which the inquiry is made involves the use of a non-District of Columbia business and address. This raises another question (more within the jurisdiction of the non-District of Columbia area where the consulting firm is located): Is the inquiring attorney required to indicate that he is not admitted to practice in the state in which his office is located?

the government action.

The firm now has been asked to represent another of the respondents to the agency action in a suit brought by a private plaintiff. The law firm does not and will not represent this corporation in the government agency proceeding. The plaintiff in the private action was not a party, a witness or a source of information in the agency action, and no facts relating to that entity were involved in it. It has been represented to us that no confidences or secrets of the government agency or of any private entity that might prove useful to any party to the private action were made known to the lawyer while a government employee.

Nevertheless, at least one of the claims of unlawful conduct asserted in the private complaint is substantially identical to a violation alleged in the government enforcement action. In particular, in both actions it is asserted that a financial instrument issued by the corporation was a type of instrument required by statute to be traded in a manner specified in the statute. The corporation contests this allegation in both proceedings.

The law firm would like the attorney to participate in the representation of the corporation in the private action. It asks whether to do so would violate any disciplinary rule given her past involvement in the agency's decision to bring a proceeding against the corporation. Specifically, the law firm asks: Did the attorney participate "personally and substantially" as a public officer or employee in the same "matter" as the subsequent private action within the meaning of DR 9-101(B) because of her involvement in the pre-complaint stage of the government enforcement action?

Discussion

DR 9-101(B) provides, in relevant part, that "A lawyer shall not at any time accept private employment in connection with any matter in which he or she participated personally and substantially as a public officer or employee. . . ." In its recent opinion in *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. App. 1984), a majority of the court of appeals described the purpose of DR 9-101(B) as follows:

> [D]espite the many legitimate concerns about the revolving door [between government and private employment] only three improprieties are addressed by DR 9-101(B). The lawyer: (1) may disclose confidential information to the prejudice of the government client; (2) may use information obtained through use of government power to the prejudice of opposing private litigants; and (3) while in government, may have initiated, structured, or neglected a matter in hope of using it later for private gain. *Id.* at 246.

As so interpreted, DR 9-101(B) addresses the same concerns as DR 4-101(B)(1)-(3), which is equally applicable to lawyers representing private and government clients. That rule provides in relevant part:

> [A] lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client;
> (2) Use a confidence or secret of his client to the disadvantage of the client;
> (3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

Applying either rule it would be unethical for a lawyer who was in fact given access to confidential information while in government employment to use that information to the disadvantage of an opponent in private litigation after leaving government employment. In this case, the lawyer in question has represented that no confidential information bearing on the subsequent private action came into her possession while employed with the government. Thus, the issue presented is whether the circumstances of her employment create a presumption to the contrary.

Because the fact of what knowledge comes into a lawyer's possession is peculiarly private to that lawyer, and because of an important public interest in preventing misuse of confidential information provided to lawyers, the courts have ruled that if a subsequent matter is "substantially related" to a matter in which a lawyer "personally and substantially" participated while representing another client, it will be presumed *prima facie* that some confidential information useful in the subsequent representation was obtained. As held by the court of appeals in *Brown, supra*, the same "substantial relationship" test is applied in revolving door cases arising under DR 9-101(B) as would be applied in a case involving switching from one private client to another arising under DR 4-101(B). 486 A.2d at 48.

The "substantial relationship" test is rebuttable, but *not* simply by an assertion that no useful confidential information was in fact obtained. As stated by the court of appeals:

> "If. . .two matters are substantially related—i.e., that it is reasonable to infer counsel received information during the first representation that might be useful in the second—there arises a conclusive inference that useful information was, in fact, received. . . . Rebuttal evidence must therefore focus on 'the scope of the legal representation' involved in each matter 'and not on the actual receipt of. . . information.' [quoting Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221, 224 (7th Cir. 1978)]. *Id.* at 50.

The majority opinion in *Brown* also describes the methodology to be applied in determining whether two matters are so substantially related as to give rise to the presumption described:

> In determining whether private matters are 'substantially related,' the courts have examined both the facts and the legal issues involved. 'Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation.' *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978). If the factual contexts overlap, the court then has to determine 'whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those [prior] matters.' *Id.* Finally, if such information apparently was available to counsel in the prior representation, the court has to determine whether it 'is relevant to the issues raised in the litigation pending against the former client.' *Id.* If all three conditions are met, the matters will be substantially related and thus deemed the same for conflict-of-interest purposes, with doubts to 'be resolved in favor of disqualification.' *Id.; see Standard Oil Co.*, 136 F. Supp. 354 at 364. *Brown, supra* at 49.

In applying the test described, the majority in *Brown* held that where two former government lawyers had represented the District of Columbia in relation to zoning applications relating to height limitations and air rights issues relating to a given property, subsequent representation by those attorneys representing the same property owner against the District of Columbia in applying for a parking special exception with respect to the same property was not so "substantially related" to the earlier representation to be the same "matter" within the meaning of DR 9-101(B). Although the parties and property were the same, the court concluded that because of differences in the specific facts and issues involved in the two former proceedings and the subsequent application for a parking exception, it could not be presumed *prima facie*, based solely on the nature of the prior employment, that the attorneys acquired confidential information "useful" in the subsequent representation in the course of their previous government employment.

In the case now presented to us we reach the same conclusion. Looking at the "facts

and legal issues involved" in light of the "scope of the prior legal representation" we find that in the circumstances of this case it cannot be presumed *prima face* that the lawyer in question came into possession of confidences or secrets in the course of her government employment that would prejudice her prior government client, prejudice an opposing private litigant or be useful in the subsequent private litigation.

In our view, the factual contexts of the two proceedings involved in this inquiry, viewed in light of the limited scope of the lawyer's involvement in the government action, do not overlap sufficiently to meet the conditions of the "substantial relationship" test as interpreted by the court of appeals in *Brown*. The most significant overlap between the two proceedings is apparently that the customer suit involves at least one of the legal issues involved in the agency administrative action. However, identity of *some* legal issues does not necessarily lead to the conclusion that the two proceedings are the same "matter." The decision in *Brown* states that *both* the facts and legal issues are to be examined. Here, facts relating to the particular customer involved in the private case were not at issue in the administrative proceeding, nor was that particular customer in any way involved in it.

We also are influenced by the fact that the lawyer's involvement in the agency action was limited to the pre-complaint stage of the proceeding, and even then it was limited to an advisory capacity. She reviewed staff proposals to institute enforcement actions and made a recommendation to her superior to approve, modify or disapprove the action proposed. The lawyer's participation ended at that point, before the proceeding on the merits began. She did not represent the agency in its administrative action against any of the three corporate respondents nor was she involved in any other stage of that litigation.

In addition, there is little reason in the circumstances of this inquiry for concern that the lawyer in question will either be disloyal to her former government employer or be in a position to curry favor among her former colleagues. The lawsuit in question is between a corporation and a private plaintiff, not between the corporation and the government. Thus, this case does not present the same appearance of impropriety concerns that arise when, as in *Brown*, a former government lawyer changes sides to represent a private party in an action brought by or against the government.

Although there are undoubtedly circumstances in which a previous government litigation and subsequent litigation between two private parties would be so intimately related that it would be necessary to presume that confidential information relevant or useful in the subsequent proceeding came into the lawyer's possession while in government employ, we do not find this inquiry to present that case. In this case no information relating to the plaintiff in the subsequent private action had been provided to the government while the lawyer was a government employee, the lawyer has represented that she in fact gained access to no information in her government employment that would prove useful in the private litigation in question, and the lawyer's role in the proceeding brought by the government agency was sufficiently limited in scope that we find no basis to presume that her representation is not true.

Inquiry No. 84-7-23
Adopted March 19, 1985

Opinion No. 151

Division of Fees Between a Law Firm and an 'Of Counsel' Attorney

• Whether an of counsel lawyer must comply with the requirements of DR 2-107(A) before he splits a fee with the law firm with which he or she is connected depends upon the precise nature of the of counsel realtionship. If the of counsel lawyer in fact functions as a partner, member or employee of the firm, then the requirements of the rule need not be met.

Applicable Code Provisions

• **DR 2-107(A)** (Division of Fees Among Lawyers)

Inquiry

Inquirer asks whether a lawyer, who is of counsel to a law firm and originates a case on which he intends to work with members of that firm, can split the fee with the firm without following the procedures set forth in DR 2-107(A). That rule prohibits division of a legal fee between a lawyer and another attorney who is not his or her "partner" or "associate" unless certain requirements are met. Because inquirer is of counsel and not a partner or associate of those with whom he wishes to split a fee, he asks whether these requirements must be followed.

Discussion

DR 2-107(A) provides:

> A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
> (2) The division is made in proportion to the services performed and responsibility assumed by each.
> (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

This language could be read to draw a distinction between the of counsel lawyer and a partner or associate and thus force of counsel attorneys to comply with the requirements of the rule. In our view, however, this conclusion does not necessarily follow.

This committee has never defined the term "of counsel," nor issued an opinion in which its proper usage was discussed. However, in today's parlance, the term "of counsel" has a variety of meanings and the concept is still evolving. It may connote the status of a semi-retired partner who has reduced his working hours, but still continues to service the firm's clients. It may refer to a retired public official who is available to the firm for consultation and advice. It may designate a lateral-entry salaried employee, too senior to be called an associate, who works on firm business and soon will be considered for partner.[1] It may signify a looser arrangement where the of counsel lawyer merely shares office space and other facilities with a firm, but is not an employee. It may describe a relationship where the of counsel lawyer has a right to call on the firm's associates for a fee.

Thus, the nature of the of counsel relationship depends on the intent of the parties involved and the manner in which the arrangement is structured and in fact operates. Similarly, the ethical ramifications of the of counsel relationship flow

[1]We thus find imprecise the somewhat dated 1972 statement in ABA Formal Opinion 330 that:

> In short, the individual lawyer who properly may be shown to be "Of Counsel" to a lawyer or law firm is a member or component part of that law office, but his status is not that of a partner or an employee (nor that of a controlling member of a professional legal corporation).

No ABA opinion deals directly with the issue of fee divisions between an of counsel lawyer and the other attorneys with whom he or she is associated.

from the actual nature of the arrangement that has been established. If the relationship is akin to that among partners or resembles that of an associate and the firm, we believe that of counsel lawyers should be treated as a partner or associate for purposes of DR 2-107(A).

Relevant in this regard is the fact that, in today's legal community, lawyers in many firms are not "partners," but instead are "members" of firms that have been incorporated. We assume that the term "partners" as used in DR 2-107(A) should be interpreted to include "members" of professional corporations, since otherwise the rule would be seriously inadequate in its coverage. As was said in ABA Formal Opinion 330:

> Generally speaking, the Code regulates the conduct of lawyers without regard to whether a particular lawyer practices as a solo practitioner, a partner in a partnership, a *member of a professional legal association*, or as an associate of another. (emphasis added)

If DR 2-107(A) should be interpreted to remove "members" of a firm from fee division requirements, we believe it also should be interpreted to remove of counsel attorneys where their status is in fact like that of a partner or associate.

The ABA has reached a like conclusion in a different context—the interpretation of DR 2-102(A)(6):

> . . . DR 2-102(A) . . . states in detail what may appear in a listing in a reputable law list or legal directory. In part, subdivision 6 states, "The published data may include only the following: name, including name of law firm and names of professional associates . . ." "Of Counsel" is not listed among the permitted items of information. It is our opinion, however, that "professional associates" as used in subdivision 6 is intended to refer not only to "associates" but also to the affiliated lawyer who is more accurately described as being "Of Counsel."

ABA Formal Opinion 330 at 5. A similar interpretation of DR 2-107(A) does not seem inappropriate when the precise relationship involved would justify such a reading.

We recognize that an argument can be made that the terms "partner" or "associate," as used in DR 2-107(A), do not include an of counsel lawyer. That argument, and the reasons it is rejected, are now discussed.

DR 2-107 was part of the ABA Model Code of Professional Responsibility that was adopted by the District of Columbia Court of Appeals in 1972. Although DR 2-101 through DR 2-105 were amended in 1978, DR 2-107 was unchanged and reads now as it did when first adopted. As remarked, none of the disciplinary rules currently in effect in the District of Columbia defines "of counsel" or delinates the term's usage. However, the DR 2-102(A)(4) provision in effect until 1978 spoke to this issue. It provided that "[a] lawyer may be designated 'Of Counsel' on a letterhead if he has a continuing relationship with a lawyer or law firms, *other than as a partner or associate*" (emphasis added). It thus could be argued that when DR 2-107 was adopted, the Court intended that a distinction generally be made between partners and associates, on the one hand, and of counsel lawyers, on the other.

Moreover, other existing Code provisions distinguish partners and associates from other lawyers with whom an attorney is affiliated. DR 5-105(D) imputes the disqualification of a lawyer to the lawyer's partners, associates or "any other lawyer affiliated with him or his firm." DR 9-102 imputes the disqualification of a former government lawyer to the lawyer's partners, associates or a "lawyer with an of counsel relationship to that lawyer . . ." It thus could be contended that DR 2-107(A) would have specifically exempted of counsel lawyers from the additional fee splitting requirements it imposes if the Court had intended that they be exempted.

We do not, however, choose to adopt these arguments, which in our view would impose a too rigid result that may not comport with the realities of the relationship among lawyers in today's legal community. Indeed, the fact that the distinction between partners and associates, on the one hand, and of counsel lawyers, on the other, was excised from DR 2-102(A)(4) in 1978 strongly suggests that it should not continue ineluctably to apply to a sister provision, DR 2-107(A). Moreover, the importance of determining exactly which lawyers are disqualified under DR 5-105(D) or DR 9-102 presents a compelling reason for specifically barring of counsel and other lawyers associated with a disqualified lawyer. The fact that of counsel lawyers are not mentioned in DR 2-107(A), which is supported by different policy considerations, does not necessarily mean that the terms used in this rule never can be interpreted to include such lawyers.

To reiterate, we believe that, where the relationship between an of counsel lawyer and his or her firm is like that between partners or between associates and the firm, DR 2-107(A) may be interpreted to obviate the fee splitting requirements not applicable to a "partner" or "associate." In the present situation, we do not have enough facts to determine whether such a relationship exists and therefore do not form an opinion as to whether these additional fee splitting requirements apply or are inapposite. We trust, however, that the above discussion will provide sufficient guidance for informed decisions by inquirer and others.

Inquiry No. 84-10-32
Adopted April 16, 1985

Opinion No. 152

Attorneys Acting as Hearing Examiners

• If an attorney from an agency's general counsel's office serves as the hearing examiner in a hearing about an employee's grievance against the agency, then: (a) if the attorney is serving as the fact-finding representative of the Chairman of the agency in relation to the hearing, there is no ethical violation if the attorney thereafter serves as legal adviser to the Chairman regarding the same matter, *provided* the attorney is careful to avoid any fraud or deception regarding the fact that the attorney, acting as hearing examiner, is serving as the Chairman's representative; but (b) if the attorney is serving as an independent quasi-judicial officer for the agency in relation to the hearing, the attorney may not thereafter ethically serve as legal adviser to the Chairman regarding the same matter under the circumstances presented in the inquiry.

Applicable Code Provisions

• **DR 1-102(A)(4)** (Attorney Conduct Involving Deceit or Misrepresentation)
• **DR 9-101(B)** (Attorney Accepting Private Employment In Matter In Which Attorney Participated As Public Officer or Employee)
• **EC 9-3**

Inquiry

The inquirer describes a situation in which the administrative structure of a government agency includes an Office of the Secretary and an equal and independent Office of the General Counsel, both of which report to the Chairman. In addition, the Office of General Counsel is the legal adviser to the Chairman.

Whenever an employee of the agency has a grievance about an adverse adminis-

trative employment action of the agency, the employee has the right to have a hearing on the matter. The "parties" at the hearing are the employee and the agency officer whose action is complained of, and the presiding officer is a hearing examiner selected by the Chairman. According to the agency's rules, the hearing examiner must be:

> . . . a disinterested person . . . [who] may be an employee of the [agency] . . . who has not been involved in any way in the action complained of and who does not supervise or report to the person whose action is complained of.

The rules further require the hearing examiner to:

> . . . render an opinion in writing . . . [which] shall contain a brief summary of the evidence considered, findings of fact, and conclusions and recommendations. The opinion shall be submitted to the Chairman, . . . [who] may, but is not required to, act upon the recommendations . . . [and who] may also seek any other resolution to which the parties are agreeable.

If either party is dissatisfied with the outcome of the matter, an appeal may be taken to the separate government agency which has jurisdiction over employee grievance appeals.

The inquirer asks whether an ethical violation is presented if an employee has a grievance regarding a decision made by the Office of the Secretary, and the Chairman appoints as hearing examiner an attorney from the Office of General Counsel, with the intention also of obtaining counsel from the attorney about the matter after the hearing.

Discussion

The outcome of this inquiry depends upon how the grievance process is treated by the agency, and upon whether the agency intends for the role of the hearing examiner to be as a representative of the Chairman for the purpose of obtaining the facts, or as an objective quasi-judicial officer. Because the facts of the inquiry are not clear in this respect, both possibilities are discussed here.

Fact-Finding Representative

If the grievance process is treated by the agency as a process in which the attorney, while serving as hearing examiner, is acting as a *representative* of the Chairman for the purpose of obtaining all of the facts, then the issue is whether the employee understands the relationship between the hearing examiner and the Chairman. Pursuant to DR 1-102(A)(4), an attorney shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Accordingly, if the agency attorney believes under the circumstances that the employee might misconstrue the attorney's role, the attorney should be careful to avoid the possibility of fraud or deception in the process; and the necessity to avoid fraud or deception may include the need to advise the employee that the attorney, in the role of hearing examiner, is gathering the facts as a representative for the Chairman.

As long as the employee is properly advised of the agency attorney's role as hearing examiner in the process, then no ethical violations occur when the hearing examiner serves as the Chairman's representative in the process, and then serves as the Chairman's attorney and advises the Chairman on the matter.

Quasi-Judicial Officer

If, on the other hand, the agency uses the hearing examiner as a quasi-judicial officer whose function in relation to the hearing is to be an independent gatherer of the facts and a decisionmaker, a different result obtains. Because the inquirer represented that the General Counsel's Office will not represent the Office of the Secretary at the hearing,[1] and because there is nothing in the disciplinary rules that would automatically prevent an attorney from the General Counsel's Office from serving as hearing examiner, it is necessary to consider DR 9-101(B) to determine whether the attorney who served as a quasi-judicial hearing examiner can provide legal services to the Chairman after the hearing in relation to the employee's grievance.

DR 9-101(B) provides:

> A lawyer shall not at any time accept private employment in connection with any matter in which he or she participated personally and substantially as a public officer or employer, which includes acting on the merits of a matter in a judicial capacity.

Although DR 9-101(B) specifically prohibits subsequent *private* employment, without addressing the subsequent "public employment" at issue here, it appears that the intent of DR 9-101(B) is to prohibit the appearance of impropriety that can generally result from "switching sides" or changing from decisionmaker to advocate in the same proceeding. This broader interpretation is buttressed by the absence of any limitation to "private" employment in EC 9-3, which provides:

> After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility, prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

Thus, DR 9-101(B) would preclude a quasi-judicial officer from later acting as an advocate in relation to the same proceeding, whether in public and private employment, and would preclude the hearing examiner from serving as attorney to the Chairman regarding the matters considered at the hearing.

Implicit in this conclusion is that DR 9-101(B) applies to the second scenario considered here (attorney as quasi-judicial hearing examiner), but not to the first scenario (attorney as fact-finding representative). The Committee bases this difference in application upon its conclusion that DR 9-101(B) contemplates a change in "sides," or at least a change in roles. When the attorney is a fact-finding representative, there is no change in "sides" or roles because the attorney acts as the Chairman's representative throughout the proceeding. When the attorney acts as quasi-judicial hearing examiner, on the other hand, the attorney is an objective decisionmaker at the hearing, but then becomes an advocate and adviser thereafter. Under the circumstances of the inquiry, DR 9-101(B) applies to the latter, but not to the former, because of this distinction.

Inquiry No. 84-10-31
Adopted April 16, 1985

Opinion No. 153

Withdrawal from Employment Due to Client's Past or Ongoing Fraudulent Acts

• A law firm which believes that its client has failed to disclose information to a governmental agency in the course of the agency's investigation must call upon its

[1] We have assumed for the purposes of this opinion that the General Counsel's Office generally represents all of the sections of the agency, including the Office of the Secretary against which the employee lodged the grievance. However, it is not clear who, if anyone, will represent the Office of the Secretary at the hearing.

client to rectify the failure to disclose. If the client fails to do so, the law firm cannot disclose the information to the agency, but if the firm represented the client at the time of the failure to disclose, the firm must withdraw from representing the client with respect to the investigation. If the firm comes to learn about the failure after its occurrence, and the failure to disclose constitutes an ongoing fraud, then the firm must withdraw from representation in that event, as well.

Applicable Code Provisions

- **DR 1-102(A)(1) and (4)** (Misconduct)
- **DR 1-103(A)** (Disclosure of Information to Authorities)
- **DR 2-110(B)** (Mandatory Withdrawal)
- **DR 4-101** (Preservation of Confidences and Secrets of a Client)
- **DR 7-102(A) and (B)** (Representing a Client Within the Bounds of the Law)

Inquiry

A firm represents Corporation Alpha with respect to a pending United States administrative investigation into whether Alpha and its competitor, Corporation Beta, violated a federal statute. As part of the investigation, the federal agency sent investigating questionnaires to Alpha and Beta. Although the law firm did not actively assist its client, Alpha Corporation, in gathering the information responsive to the questionnaire, the law firm reviewed the completed response for form prior to submission to the United States agency.

Later, the law firm came to believe that Alpha's responses to the questionnaire were not complete. Based on that view, the law firm withdrew from representation of Alpha with respect to the investigation.

Alpha subsequently entered into a settlement agreement with the federal agency, as did Beta. Since the law firm no longer represented Alpha, it played no part in negotiating the settlement agreement. If additional facts had been disclosed in Alpha's response to the agency questionnaire, however, the outcome of the proceeding and/or the settlement terms might have been affected.

Several months after the settlement agreement was reached, the law firm was visited by an executive officer of a holding company that is a part owner of Beta Corporation The officer told the law firm that in his view neither corporation Alpha nor Beta had made a complete response to the government agency questionnaire, and he asked the law firm to render a written opinion whether the corporate activity not disclosed was unlawful, and concerning the legal ramifications of not reporting the activity to the government agency.

The law firm rendered a written opinion that the activity not disclosed was probably unlawful. The law firm also recommended that both corporations Alpha and Beta disclose the activity to the agency. The corporate officer told the law firm he would inform both corporations of the firm's advice. The officer later informed the law firm that both corporations Alpha and Beta were not in favor of disclosing the complete nature of the activity to the agency, a decision with which he agreed.

The officer also told the law firm that within six weeks, the corporations would discontinue the practice in question. Over the ensuing months, the law firm sought to learn whether cessation of the practice had, in fact, occurred. The law firm also advised officials that any continuation of the practice should be disclosed. The firm was told by Alpha that the activities in question had been discontinued by both Alpha and Beta.

The inquirer, an associate who previously helped the law firm review the questionnaire responses of Alpha and who resigned, in part because of his disagreement over the length of time it was taking the law firm to resolve the matter, renewed his continual recommendation that further information concerning the activities be provided to the agency, whether or not the activities were unlawful.[1]

The law firm subsequently informed the associate that in its judgment the activity engaged in by Alpha and Beta was lawful. However, in large part because of the associate's insistence, the firm recommended to Alpha and Beta that they authorize it to disclose the activity in question to the federal agency. Both companies Alpha and Beta instructed the law firm not to do so. The law firm has stated that it will abide by their instructions.

The inquirer asks the following questions:

(1) What responsibility, if any, do corporations Alpha and Beta have to supply information to the agency concerning the activities in question?

(2) Assuming corporations Alpha and Beta refuse to provide this information, what responsibility, if any, does the law firm have to provide the information?

(3) Assuming both corporations Alpha and Beta, and the law firm, refuse to provide this information to the agency, and a responsibility exists, what is the responsibility of the previous associate of the law firm?

The inquiring associate also requests that the Committee consider the effect, if any, of bar membership in several other jurisdictions by members of the hypothetical law firm and the associate.

Discussion

The inquirer's first question concerning the responsibility, if any, that corporations Alpha and Beta have to supply the agency with information presents an issue of law, as it addresses the corporate responsibility to the agency. This Committee has frequently reiterated that it is without jurisdiction to consider and resolve questions of law, as distinct from questions of professional ethics. *See, e.g.*, Opinion No. 119; Rule C-5 of the Rules of the Committee on Legal Ethics.

Assuming that Alpha and Beta are required to provide information to the agency concerning the benefits, what is the responsibility of the law firm to provide the information? DR 7-102(B) supplies the answer.

DR 7-102(B) provides:

> A lawyer who receives information clearly establishing that
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same.
> (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

The first question raised by DR 7-102(B), therefore, is which corporations were the clients of the law firm at the time it recommended disclosure to the agency. This Committee cannot answer this question with certainty, as even the inquiry is not clear on this issue.[2] It would appear, however, that corporations Alpha and Beta were both clients of the law firm when the firm rendered a legal opinion to the holding company official concerning disclosure of information to the agency. Certainly, the law firm had communications concerning the matter at hand with both corporations, both through the holding company official

[1]Throughout this period, the agency continued to administer the settlement agreement. In part, this monitoring activity was based on the questionnaires. Were the agency to have found a violation of the agreement, it could have terminated it and, if the violation had been willful, initiated proceedings for the assessment of civil penalties.

[2]The inquirer notes that when the official came to the corporation, he stated that he was asking for an opinion on behalf of Beta as well as Alpha. The law firm billed its time for the work on this opinion to Beta. Later, however, the law firm apparently decided that its "client" in this matter was the holding company that owned Beta.

and, in the case of Alpha, directly. More importantly, the law firm ultimately felt itself bound by the instructions from corporations Alpha and Beta not to disclose the benefits to the federal agency. Therefore, the balance of this opinion assumes corporations Alpha and Beta were both clients of the law firm when a decision was made by the corporations not to inform the agency of the receipt of the benefits, against the firm's written advice, orally was communicated by the official.

The second question raised by DR 7-102(B) is whether Alpha and Beta's failure to disclose the benefits constitutes a "fraud upn a tribunal." This Committee assumes that the answer is in the affirmative.[3]

In this jurisdiction, DR 7-102(B) mandates that, assuming that the failure of the corporations fully to inform the agency constituted a fraud upon that tribunal, the law firm must call upon their clients to rectify the same. If the clients refuse to do so, the law firm is ethically proscribed in this jurisdiction under DR 4-101 (Preservation of Confidences and Secrets of a Client) from itself disclosing this information to the tribunal.[4] The firm, then, has met its ethical obligations on the disclosure issue. *See* Opinion 9 (a criminal lawyer is not ethically obligated to alert the court when he discovers that his criminal client has violated one of the conditions of his release). Since there is no obligation to disclose, the law firm continues to be bound by DR 4-101(B)(1) which forbids a lawyer or law firm to "reveal a confidence or secret of his client."

The law firm cannot, however, continue to represent Alpha Corporation, and can only continue to represent Beta Corporation if Beta's failure to disclose is viewed as a "past fraud" rather than a continuing one.

With respect to Alpha Corporation, the firm cannot represent that ex-client with respect to the governmental investigation consistent with its responsibilities under DR 2-110(B). That disciplinary rules states, in part, that:

> A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment...if he knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

Engaging in fraudulent or misleading activity is a violation of DR 7-102(A)(3) and (A)(7), and DR 1-102(A)(4) ("a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation").

Where, as here with respect to Alpha Corporation, a lawyer represents a client in the course of a proceeding and later learns that information provided the tribunal was false or misleading, then the lawyer must withdraw if the client refuses to rectify the problem. Otherwise, the lawyer himself runs the risk of violating DR 7-102(A)(3) and (A)(7), or DR 1-102(A)(4). Case law supports this result. *See e.g., In re Carter & Johnson*, Securities Rel. No. 17,597, Fed.Sec.L.Rep. (CCH) ¶82,847 (Feb. 25, 1981) (a lawyer cannot simply sit on the sidelines when he or she knows that his or her client is engaged in fraud; he must take active steps to rectify a failure to disclose or, if the client refuses, he then must withdraw). *See also SEC* v. *National Student Marketing Corp.*, 457 F.Supp. 682 (D.D.C. 1974). *Cf.* Connecticut Bar Informal Opinion 82-11 (a lawyer should withdraw from further representation of a client who intends to answer an interrogatory question falsely). This does not mean that the law firm cannot continue to represent a client with respect to work unconnected with the governmental investigation and settlement.

The representation issue with respect to Beta is somewhat less clear, and turns upon whether Beta's failure to disclose the activity to the agency is an "ongoing fraud." This question need not be answered with respect to Alpha Corporation because the law firm represented that corporation at the very time the misrepresentation to the agency, *i.e.*, the failure to disclose the activity, was committed. It was because of the misrepresentation that the firm initially withdrew from representation of Alpha and this Committee finds that the firm should not now renew its representation.

But the firm did not represent Beta until, at the earliest, it produced an opinion to the officer recommending disclosure of the information. Beta like Alpha, declines to do so. Can the firm now represent Beta Corporation?

The answer turns upon whether Beta's failure to disclose is a past versus an ongoing fraud—a question we do not decide, as the answer necessarily turns upon the specific facts and circumstances to which the Committee is not privy. *See* Kramer, Clients' Frauds and Their Lawyers' Obligations, 67 Geo. L.J. 991, 1001 (1979). If the fraud is a past one, the firm may represent Beta. To hold otherwise would be tantamount to deciding that corporations that violate a disclosure law cannot obtain legal representation.

If, however, the fraud is viewed as "ongoing," then the firm cannot represent Beta if it continues to reject the advice to disclose. Otherwise, the firm would itself run afoul of DR 7-102(A) or DR 1-102(A)(4).

The inquirer's last question is whether an associate of the law firm has any independent responsibility, assuming that corporations Alpha and Beta, and the law firm, refuse to provide the information to the agency. Under our present Code of Professional Responsibility, and on the facts of this case, the responsibility of the associate not to disclose is identical to that of his/her firm.[5] In Opinion 82-79 (1983), the Association of the Bar of the City of New York addressed the inquiry of an associate who sought guidance on what to do when he discovers what he believes to be an ethical violation by the partner under whose supervision he is working. The New York Bar Opinion states that "it is fundamental that the ultimate responsibility of an associate to report misconduct [under DR 1-103(A)] is neither enhanced nor diminished by virtue of his or her subordinate position."[6] Where an associate has "clear knowledge" of a violation of a

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[3]We make this assumption because, while the law firm vacillated on this crucial question, i.e., whether the corporation's failure to disclose to the agency was fraudulent, the firm never vacillated in its advice to the corporations that they in fact disclose. If the failure to disclose was not a fraud on the tribunal, then the law firm would have no relevant Canon 7 duty of disclosure.

[4]DR 7-102(B)(1), as adopted by the District of Columbia Court of Appeals, differs from the American Bar Association Code of Responsibility, (amended 1975), adopted in other jurisdictions. The ABA version provides that:

> A lawyer who receives information clearly establishing that his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and *if his client refuses or is unable, to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.* (Emphasis added.)

A lawyer operating under the ABA rule must "blow the whistle" unless doing so would involve disclosing a confidence or secret of the client. Under the ABA rule, therefore, as in the D.C. Code of Professional Responsibility, a lawyer's duty under Canon 4 not to reveal confidences or secrets of a client takes precedence over the duty imposed by DR 7-102(B). ABA Formal Opinion 341.

[5]Under the ABA final draft of the Model Rules of Professional Conduct, not effective in the District of Columbia, "a subordinate lawyer" does not violate the rules of professional conduct if that lawyer acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty. Model Rule 5.2(b).

[6]DR 1-103(A), in the District of Columbia, provides that:

disciplinary rule, a situation not present in the instant inquiry, the New York City Bar Opinion advises the associate to attempt to resolve the problem within his own firm before "blowing the whistle" on his partners. Here, however, we have concluded that the law firm is obligated not to (and, in fact, cannot) disclose the confidences or secrets of its clients, and the former associate remains under precisely the same obligation.

Finally, the inquirer has asked the Committee to consider the effect, if any, of bar membership in other jurisdictions by members of the law firm. This Committee declines to answer this question, as it is our policy to limit our consideration of ethical issues to whether the conduct postulated would place a lawyer in violation of the District of Columbia Code of Professional Responsibility. We do not interpret the requirements of the profession of other jurisdictions which might assert an interest in the conduct in question. *See* Opinion 105; Opinion 9.

Inquiry No. 84-3-11
Adopted May 21, 1985

Opinion No. 154

Multiple Representation

• A lawyer may represent more than one client in the preparation and filing of applications in the random selection lotteries conducted by the Federal Communications Commission for cellular radio licenses, provided that each client consents to the arrangement after full disclosure of the effect of the multiple representation on the lawyer's performance and the client's interests. The lawyer must withdraw from the multiple representation if an actual conflict emerges between or among his clients in connection with a post-lottery challenge to the winning application, but with appropriate consent (including permission to use client confidences and secrets) he may continue to represent one side of the conflict.

Applicable Code Provisions

• **DR 4-101** (Preservation of Confidences and Secrets of a Client)

• **DR 5-105(A)&(C)** (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer)

Inquiry

The inquirer is an attorney requesting advice concerning the representation of multiple clients in so-called "random selection lotteries" conducted by the Federal Communications Commission for cellular radio licenses. Under the Commission's procedures all applicants for a cellular radio license are ranked according to the results of a random lottery, without regard to the individual merits of any application. After the lottery, competing applicants are permitted to challenge the award of the license to the lottery winner based solely on whether the winning application satisfies certain minimum qualifications. If a challenge succeeds, the Commission disqualifies the winner and awards the license to the second-place applicant, unless that award also is successfully challenged. This seriatim challenge process continues until an application either goes unchallenged or survives a challenge and the Commission finally makes the award.

Two separate questions arise: whether multiple representation is permissible in the preparation and filing of cellular radio applications, and if so, whether the representation may extend to advice or litigation in connection with a post-lottery challenge to a winning application.

Procedural History

The Committee originally issued an opinion on this subject in July 1985. At that time, believing (incorrectly) that the cellular radio selection procedure involved comparative analysis of competing applications, the Committee concluded that multiple representation was impermissible at all stages of the process. After publication of an opinion to that effect, the Committee received a number of letters and inquiries from members of the communications bar indicating that the premise for the Committee's opinion was incorrect. The Committee, accordingly, withdrew its opinion. The present opinion states the Committee's views based on the facts as we now understand them.

Discussion

1. Multiple Representation in Application Preparation and Filing

DR 5-105 provides in relevant part:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-101(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients *if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure* of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. (Emphasis added.)

Under these provisions, representation of multiple clients with competing interests is permissible if: (1) it is obvious that the representation will be adequate to the purposes of each client as defined by that client; and (2) each client understands and consents to the effect that the multiple representation may have on the lawyer's performance and the client's interests. The general principle of the Committee's cases permitting multiple representation is that the parties perceive a common objective even amid their differing interests and that they give informed consent to common representation in pursuit of that objective.

Thus, the Committee has upheld the representation by a single law firm of two corporations in drafting agreements between them that the parties had negotiated in general terms. The Committee reasoned:

> Here the parties apparently would obtain from the firm just the representation that they think they need and that they want. If, in the course of reduc-

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A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

The ABA Model Code of Professional Responsibility version of DR 1-103(A) is different, providing that:

> A lawyer possessing unprivileged knowledge of a violation [of a disciplinary rule] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

The primary difference between the Model ABA Code rule and the current District of Columbia disciplinary rule is that the ABA rule imposes a mandatory duty to report disciplinary violations. The D.C. rule does not require such disclosure except in response to inquiry by an investigating authority. Opinion 130.

ing to writing the agreements that have already been concluded in substance. unprovided-for contingencies or other sources of remaining disagreement or incomplete agreement are uncovered. the law firm can advise both clients of the problems and refer them to the principals for resolution. The law firm can attempt. in the drafting of the agreements. to allocate fairly benefits and burdens of the bargain whose existence or nature may not have been obvious to the lay principals. informing both clients of what it has done. *If as a result the parties have jointly a professional adviser and learned scrivener instead of each having a negotiating champion, that is because the adviser/scrivener and not the champion is what each has said it wants: the law firm's services as adviser scrivener constitute representation adequate to the desires and purposes of the parties.* Opinion No. 49 (1978) (Emphasis added).

Similarly. the Committee has found dual representation of commonly aligned litigants to be permissible where the litigants sought the same result. albeit on different and potentially inconsistent grounds. The Committee explained:

> [T]he representation will be adequate to the purposes of the clients in the light of the understanding of the nature of the representation that is necessarily implied by each client's consent to the dual representation after the disclosure to each client of how the duality of the representation will affect the lawyer's performance. Opinion No. 54 (1978) (Emphasis omitted).

The Committee also has concluded that a driver and a passenger in an automobile collision may share representation by a single attorney where their separate interests are subdued to a common aim. Opinion 140 (1984). Even in the naturally conflict-ridden circumstances of divorce. we have recognized the possible propriety of joint representation on the ground that "subpart (C) of DR 5-105 permits the prospective clients. after full disclosure of all relevant facts and potential disadvantages. to exercise *their* judgment that. nothwithstanding those potential difficulties. joint representation for the limited purpose of seeking limited objectives is adequate to *their* purposes." Opinion No. 143 (1984) (Emphasis in original).

In the present case. we are advised that multiple representation affords cellular radio applicants substantial cost savings that may be necessary to permit them to participate in the lottery process because of the relatively small chance that any particular applicant has of actually prevailing. Whatever the particular client motivations may be. we think it obvious that a lawyer can adequately represent the interests of multiple clients in the preparation and filing of applications. Since parties do not compete against each other on the merits of their applications. the same attorney can zealously represent the interest of each client in the preparation and filing of a qualified application. Accordingly. multiple representation is permissible in these circumstances. provided that each client gives informed consent to the arrangement.

Informed consent means. first. that the client must recognize and consent that the attorney's role will be to qualify each client for the lottery and that the consequence. therefore. may be to increase the number of participants in the process and reduce the statistical chances of success of each participant. In addition. each client must understand and consent that. as discussed below. there are circumstances in which it will become necessary to retain new counsel at additional expense. since the same attorney or firm cannot represent each client in the event of an actual conflict between or among clients in connection with a post-lottery challenge. We understand that various lawyers have proposed to resolve such a conflict differently. some preferring to withdraw from the multiple representation entirely. others intending to continue representation of one side of the conflict.[1] In any case. in consenting to multiple representation. each client must appreciate the various possibilities requiring him to engage new counsel.

Apart from these effects. we do not see how multiple representation can unduly disadvantage any particular client. So long as they recognize the potential disadvantages. the clients are free to obtain the cost savings or any other benefits that they see from multiple representation.[2]

2. Multiple Representation in Connection with Post-Lottery Challenges

Multiple representation in connection with post-lottery challenges presents a somewhat more difficult issue. Of course. multiple representation may extend beyond the preparation and filing of applications to include post-lottery advice and litigation so long as the clients' objectives do not diverge. However. one client may win the lottery. while another client desires or needs advice whether to attack the winning application.

In that event. we believe that the lawyer and his firm are required to withdraw from the multiple representation. regardless of the clients' consent. The clients at that point no longer share a common objective. and it is no longer "obvious" that the same attorney can adequately represent each client's interests. As we stated in Opinion 158 (1985) with regard to representation of opposing sides in litigation:

> "Such simultaneous representation puts a lawyer in the same case in the *impossible* position of arguing both sides against each other. and we have no doubt that even consent should *not* permit such representation to occur." (Emphasis added.)

The same bar must apply to pre-litigation advice. since a lawyer under Canon 7 must zealously represent his client's interests. The same lawyer cannot possibly do so if asked to represent simultaneously a winning applicant and a potential challenger. *Compare* Opinion No. 131 (1983). where the Committee found that dual clients had no common objective permitting a conflict to be waived.

It does not follow that the lawyer must withdraw from the representation of each side in such a conflict. If informed consent is obtained, no ethical proscription prevents continued representation of one client when the lawyer must withdraw from multiple representation because of a non-waiveable conflict. In Opinion 158 we upheld the propriety of undertaking a new representation adverse to the interests of a prior client upon the latter's consent. despite the conclusive presumption under DR 4-101 that the former client's confidences and secrets would be shared in the

[1] As discussed in the text below. continued representation of one side of the conflict requires appropriate consent. including the waiver of Canon 4 protections. The Committee does not address in this opinion whether binding consent may be obtained at the outset of the engagment before the conflict has actually emerged. *See* Opinion 165. Whether or not it can be. the matter must be discussed with each client before the lawyer is initially retained if there is a reasonable possibility that the parties ultimately may adopt this approach to eliminating a conflict.

[2] The Committee is informed that applications prepared by the same law firm frequently rely on identical material. such as engineering reports. If such material includes information protected under DR 4-101. the client from whom the information is obtained. of course. must consent to its use on behalf of other clients. *See* discussion *infra* of DR 4-101.

"substantially related" new engagement. We reached this conclusion because DR 4-101 itself permits a lawyer to reveal or use a client's confidences and secrets with the latter's consent. In addition, we observed:

> "The lawyer in such situations has only one loyalty, and, given the informed consent of the former client, there is no conflict of interest barring zealous representation of the client the lawyer now represents."

There is no reason why the same analysis should not control when it is proposed that the lawyer only partially withdraw from multiple employment to eliminate a conflict.

The consent required to permit this, of course, must be obtained on the basis of full disclosure of the effect of the arrangement on the interests of the disadvantaged client. Specifically, the client no longer to be represented must understand that the lawyer will act to protect and advance the interests of that client's actual or putative opponent, that this may entail the use against the client of his own confidences and secrets that otherwise would be protected under DR 4-101, and that the client in any event will be required to obtain the services of another attorney if he wishes to be represented in the matter.

Inquiry No. 84-10-30
Adopted March 18, 1986

Opinion No. 155

Prepaid Legal Services Plan

• A prepaid legal services plan under which clients would pay in advance for and thereby reserve a certain number of hours of legal services each month may inadvertently involve the charging of excessive fees if not carefully administered but is otherwise not objectionable.

Applicable Code Provisions

• **DR 2-103** (Solicitation of Professional Employment)
• **DR 2-106** (Fees for Legal Services)
• **DR 3-102** (Dividing Legal Fees With a Non-Lawyer)
• **DR 5-105** (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer)
• **DR 5-107** (Avoiding Influence by Others Than the Client)

Inquiry

A law firm asks the Committee's opinion on whether a prepaid legal services plan which it intends to propose to a non-profit organization, at the organization's request, raises any ethical problems. The plan would provide corporate, tax and general business law services on a reduced hourly fee basis to the organization's members, all of which are small, non-profit, tax-exempt organizations.

The member organizations would pay a set monthly amount to participate in the plan depending on the number of hours per month each member wishes to "reserve," up to a maximum of ten hours per month. The hourly fee would decrease slightly as the number of "reserved" hours increases. A member requiring more hours than the guaranteed monthly number would be charged an hourly rate based upon the member's yearly gross income, as established in a separate schedule. The additional hourly rate would not exceed the firm's regular hourly rate. No refunds will be made for any unused guaranteed hours, but the member organizations can accrue unused hours for a certain period of time, as yet undetermined in length.

All charges would be billed directly to the individual member organizations. The parent organization would receive ten percent of the member organizations' set monthly fee to cover the administrative costs of the program.

Discussion

This Committee has previously commented favorably on the development of new approaches to providing affordable legal services to individuals who previously could not afford an attorney. This is equally true, of course, for small, non-profit organizations that rely on donations or grants for their funding. In the Committee's view, four issues are raised by this particular plan: the fee arrangement, the ten percent distribution to the parent organization for administrative costs, the possibility of the parent organization exerting control over the law firm's dealings with the member organizations, and representation of multiple clients. The fundamental requirement is that legal services plans must "conform to the general and accepted norms of ethical conduct designed to protect the public and the profession." Opinion No. 91. *See also* EC 2-16. The proposed legal services plan under consideration here appears generally to conform to these norms.

We addressed fee arrangements in Opinion No. 30 in response to inquiries about two separate proposals to offer legal services to union members.[1] In the two proposals at issue in that opinion, the fees were set in advance. In the first plan, the union was to pay a law firm an annual fee for representing its members. In the second plan, the union members were to pay for legal services pursuant to an established fee schedule. In the present inquiry, we also are dealing with a commitment to render certain types of legal services for a fixed amount.

Thus, the cautions stated in Opinion No. 30 apply equally to the present proposal. DR 2-106(A) prohibits a lawyer from entering into an agreement for, charging or collecting an illegal or clearly excessive fee. An excessive fee is defined in subparagraph (B) of that rule as one which, after a review of the facts, would leave a lawyer of ordinary prudence "with a definite and firm conviction that the fee is in excess of a reasonable fee." DR 2-106(B) also specifies eight factors to consider in determining the reasonableness of a fee. Some small risk of charging an excessive fee exists in the present proposal since a member organization contracts to pay a fixed monthly amount based on its anticipated monthly needs, regardless of whether it actually uses all the hours for which it makes payment.[2] This risk is mitigated by the small maximum hour limitation and by the provision that allows a member organization to accrue unused hours for later use. The law firm should be careful, however, in determining the length of time an organization can accrue hours; it should not be so short a time period that the organization cannot reasonably use the accrued hours, nor so long as to allow a member to accrue a vast number of hours and then require all the firm's time to the detriment of the other member organizations. Experience may also show the necessity of adopting a flexible policy allowing each member to reduce the hours on which its monthly charge is based. Assuming these cautions

[1]Subsequent amendments to DR 2-103(C) have obviated parts of Opinion No. 30. However, the final paragraphs of that Opinion pertaining to the impact of DR 2-106 on fixed fees are still applicable.

[2]In that respect, this portion of the fee arrangement is analogous to the non-refundable minimum fee discussed in Opinion No. 103, in which the Committee reviewed the potential for violating DR 2-106(A) under that type of fee arrangement.

are heeded, we discern no ethical bar to the proposed fee arrangement.[3]

We also cautioned in Opinion No. 30:

> It is particularly important that the lawyer or firm considering quotation of a fee schedule in the abstract or the commitment to render described types of professional services for fixed amounts describe with care the circumstances and conditions that may limit the services that will be covered. . . .
>
> ***
>
> Before entering into any arrangement for a package of prepaid legal services or promulgating a general fee schedule, a lawyer should take adequate precautions to gauge the likely effect of the various factors that may influence the extent and value of the services he will be expected to render.

In the plan under consideration here, the firm proposes to set aside time for clients at a reduced hourly rate. The firm must be careful, therefore, in its general representations and in each specific instance, not to mislead clients into believing that the various matters which the organizations may bring to the firm will or can always be completed within the specified number of hours per month without any additional charges to the client.

The ten percent distribution to the parent organization also warrants examination. This arrangement, without more, might violate DR 3-102(A), which prohibits a law firm from sharing legal fees with a non-lawyer, except in three circumstances not relevant to this inquiry.

The inquiry describes the distribution as follows: "The parent organization would receive, under the written proposal, ten percent of the set monthly amount paid by its members for the guaranteed hours to cover the cost of administration of the program." The exact procedures for payments by the clients and for distribution of funds between the firm and the parent organization are not specified. DR 2-103(C) prohibits an attorney from compensating an organization for recommending or securing his or her employment, except to pay for permissible advertising costs and for other usual and reasonable fees. It is not clear from the information available to the Committee that the ten percent distribution to the parent organization accurately represents reimbursement for expenses actually incurred by the parent organization. Thus, the firm must make certain that the percentage bears a reasonable relationship to the costs incurred and the services provided by the parent organization. Alternatively, the firm could simply pay for services actually performed by the parent organization in order to avoid any concerns under DR 2-103(C) or DR 3-102(A).

The plan appears to protect the law firm's obligation of independent professional judgment on behalf of each individual member organization for which it does legal work. DR 5-107(B) requires that a lawyer not permit someone "who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." Unlike the inquiries in Opinion No. 30, *supra*, the present inquiry does not expressly state that the parent organization recognizes the existence of an attorney-client relationship between the law firm and its members, but this relationship seems fairly inferrable from the facts provided to us for several reasons. First, the member organizations are individually charged a monthly amount that is based on the number of hours each member determines it will need. Second, the member organizations are billed directly by the law firm. From these direct dealings, we assume the member organizations will also arrange appointments with the law firm's attorneys directly, as well as decide on their own the matters on which they need legal assistance.

Thus, since all the contacts, except for the original procurement, are directly between the law firm and the individual member organizations, the attorney-client relationship between the firm and member organizations seems clearly established.

The facts provided to us do not indicate whether the law firm also represents the parent organization. Nor do the facts show the exact relationship of the parent organization to its members. Whatever the relationship between the parties, as stressed in Opinion No. 30, *supra*, under DR 5-107 the firm owes its undiluted loyalty to the member organization client it represents. The firm must not tailor its representation in order to maintain the favor of the parent organization that has arranged and recommended its services. If the law firm also represents the parent organization, it also must observe the requirements of DR 5-105 concerning representation of multiple clients. *See* Opinions Nos. 30, 49, and 94.

Inquiry No. 81-8-24
Adopted June 18, 1985

Opinion No. 156

Representation of Prospective Adoptive Parents by the Guardian of the Child

• A lawyer appointed to act as guardian *ad litem* on behalf of a child in a neglect proceeding may not also represent prospective adoptive parents of that child in a separate adoption proceeding with respect to the same child even if there is no known conflict between the positions of the child and the prospective adoptive parents. Because appointment of a guardian *ad litem* presupposes that the child requires separate representation of its individual interests, and because a child is presumptively too young and inexperienced to provide informed consent, the conditions that might otherwise permit joint representation of the prospective parents during the pendancy of the neglect proceeding cannot be met.

Applicable Code Provisions

• **DR 4-101** (Preservation of Confidences and Secrets of the Client)
• **DR 5-101** (Refusing Employment When the Interest of the Lawyer May Impair His Independent Professional Judgment)
• **DR 5-105** (Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer)

Inquiry

May a lawyer who has been appointed guardian *ad litem* for a child in a neglect proceeding before the Family Division of the District of Columbia Superior Court also represent prospective adoptive parents of the same child in an adoption proceeding?

Discussion

Pursuant to D.C. Code Sections 16-2301(9) and 16-2304(b) (2), the Family Division of the Superior Court of the District of Columbia is required to appoint attorneys as guardians *ad litem* to represent children in neglect proceedings in

[3]Indeed, a primary justification for "retainers" in any situation is the assurance that the lawyer's time will be available to the client if and when needed, an arrangement which may "preclude other employment by the lawyer." DR 2-106(B) (2).

Superior Court. Such attorneys are selected by the Office of Counsel for Child Abuse and Neglect. In addition to acting as counsel for the child in the neglect proceedings, such guardians *ad litem* also make legal decisions on behalf of the child, subject to review by the court. In both capacities, as legal representative and guardian *ad litem*, the lawyer is charged with acting in the best interests of the child.

Prior to termination of the neglect proceeding, or shortly thereafter, it is not uncommon for adoption proceedings to be initiated on behalf of prospective adoptive parents in Superior Court. The adoption proceeding is a separate proceeding from the neglect proceeding. Since the lawyer who acts as guardian *ad litem* for the child has often come to know and be known to the prospective adoptive parents in the course of the lawyer's activity on behalf of the child in the neglect proceeding, the attorney/guardian *ad litem* is often asked by the prospective parents to act as their attorney in the course of the adoption proceeding. The question presented is whether, consistent with applicable disciplinary rules, the attorney may do so, particularly given that the child for whom the lawyer acts or has acted as guardian *ad litem* is presumptively too young and inexperienced to provide informed consent.

Presuming that the neglect proceeding has not been terminated and that the inquiring lawyer is still acting as guardian *ad litem* for the child in that proceeding, the starting point for analysis of whether he may simultaneously represent the prospective adoptive parents of the same child in the adoption proceeding is DR 5-105. That Rule provides, in relevant part:

> (A) A lawyer shall decline proferred employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interest, except to the extent permitted under DR 5-105(C).
>
> ***
>
> (C) In the situations covered by DR 5-105(A)..., a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

As discussed in our Opinions 49, 54 and 143, the practical effect of Rule 5-105 is to divide potential simultaneous representation situations into three categories: (1) situations in which no actual or potential conflict can be foreseen and multiple representation is unquestionably appropriate, (2) situations in which an actual conflict preventing simultaneous adequate representation of both clients exists and thereby absolutely precludes representation and (3) the intermediate category in which no conflict precluding adequate representation is now known to exist, but there is sufficient likelihood of a conflict arising that a lawyer is not permitted to undertake multiple representation without obtaining the informed consent of all clients involved.

Within this tripartite framework, we think it apparent that the circumstances of a neglected child represented by a guardian *ad litem* and those of prospective adoptive parents of that child are not so free from potential conflict as to permit concurrent representation in an adoption proceeding without meeting the requirements of DR 5-105(C). The issue in the adoption proceeding itself is whether the interests of the child and the prospective parents are so common as to permit adoption, and it cannot be assumed before that proceeding even begins that a lawyer representing both a child and prospective parents would not be called upon to represent interests that differ.

The question presented under DR 5-105(C) then becomes (1) whether the informed consent of the child is effectively obtainable, and, even if so, (2) whether the lawyer acting as guardian *ad litem* can conclude that it is "obvious" that simultaneous representation of the child and the prospective parents would be "adequate" to the interests of both. In our view, it is probably unnecessary to attempt to answer the second question because a neglected child for whom a guardian *ad litem* has been appointed is presumptively incapable of providing informed consent to the joint representation proposed so long as his guardian is the same lawyer to whose joint representation the child has been asked to consent.

Among the reasons why a guardian *ad litem* is appointed for a child is that the child is presumed to be incapable of making informed decisions on legal and other matters on his or her own behalf. Thus, the child cannot individually provide the informed consent to joint representation that DR 5-105(C) requires. The only alternative would be for the guardian *ad litem* to make that decision for the child. But, in our view a lawyer asked to provide consent on behalf of a child to his own representation by another would place himself in conflict with DR 5-101(A), particularly if the prospective parents intend to pay for their representation.

DR 5-101(A) forbids a lawyer, without informed consent of the client, from exercising professional judgment on behalf of a client when that judgment "will be or reasonably may be affected by his own financial, business, property or personal interests." In effect, the offer of employment by the prospective parents places the lawyer in a box from which there is no escape; the lawyer cannot provide disinterested consent to his own employment by the prospective parents. The consent provision of DR 5-101(A), like that of DR 5-105(C), cannot be met if the client is not capable of providing informed consent.

We also think it highly unlikely that the lawyer could conclude that he could provide "adequate" representation to the child and the prospective parents acting for both. Until successfully completed, an adoption proceeding presupposes that different "interests" are involved as between the child and the prospective adoptive parents and that the "interests" of each party should be fairly and adequately presented to the court. The fact gathering and presentation process that the attorney for the child and the prospective parents should undertake also presupposes that facts about the other will be examined with the interests of only one client or set of clients in mind. Thus, in our view it would almost inevitably detract from the fact-gathering and fact presentation missions of an adoption proceeding if a lawyer appointed to represent the interests of a minor were permitted to appear on behalf of prospective parents in an adoption proceeding involving the same child.

The foregoing analysis presupposes that the neglect proceeding is ongoing and that the lawyer is being asked to act for the child and parents simultaneously. A different disciplinary rule is involved if the neglect proceeding has been terminated and the lawyer is no longer acting as guardian for the child. But in almost all cases the result will be the same.

Subsequent representation situations are governed by DR 4-101(B) and (C), which provide in relevant part:

> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.
(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:
(1) Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them.

Although the adoption and neglect proceedings are separate, and we have presumed that the neglect proceeding is completed, the two proceedings will in most cases be so "substantially related" that it is obvious that facts made known to the lawyer in the neglect proceeding would have some relevance to the subsequent adoption proceeding. Thus, under cases applying the "substantial relationship test," it is clear that representation of the prospective parents subsequent to the neglect proceedings would also be barred unless informed consent of the child can be obtained. *E.g.*, *In re Yarn Processing Patent Validity Litigation*, 530 F. 2d 83 (5th Cir. 1976).

In this connection, we note that where the lawyer is not being asked to represent two interests simultaneously, DR 4-101(C) does not require an inquiry into whether "adequate" representation can be provided to two sets of interests. The assumption is that if the lawyer is retained by the parents after the previous representation of the child has ended that the lawyer will represent his new clients zealously and without reservation. *See* DR 7-101. It is because of that fact and because the lawyer has presumably obtained some confidence or secrets about the child in the course of the neglect proceeding that may be relevant to issues arising in the subsequent adoption proceeding that DR 4-101 requires that informed consent be obtained to such disclosure and use of those confidences or secrets before the proposed representation of the child's prospective parents may be undertaken.

We come, then, to the same problem that prevented consent to representation of the prospective parents when the neglect proceeding was still in progress. Because of his or her minority and presumed inability to make a truly informed decision concerning the wisdom of permitting the representation proposed, the child is incapable of giving informed consent to the inquirer's subsequent representation of prospective adoptive parents and the representation is thus barred. The standards of informed consent under Disciplinary Rules 4-101 and 5-105 are the same, and if a child is incapable of providing informed consent to simultaneous representation, he or she is likewise incapable of providing informed consent to subsequent representation.

The only situation we can envision in which informed consent to the former guardian's subsequent representation of prospective adoptive parents might be effective to meet the requirements of DR 4-101(C) would be if another guardian had been appointed for the child in the meantime. If that guardian, acting for the child, and after being presented with full disclosure of all facts known by the former guardian about the child and aware that the former guardian would have to use whatever knowledge he possesses about the child for the benefit of the prospective adoptive parents if the representation is undertaken, nevertheless provides uncoerced consent to the representation, the requirement of DR 4-101(C) would appear to be met. Otherwise, however, such representation would not be permissible.

Inquiry No. 85-3-9
Adopted July 16, 1985

Opinion No. 157

Joint Representation of a Tax Shelter Promoter and Investors in a Tax Proceeding

• So long as no existing conflicts in positions to be taken by the lawyer exist or are clearly unavoidable, a lawyer may provide joint representation to a tax shelter promoter and investors in the shelter asserting a common position in a tax proceeding, provided that informed consent to such representation is obtained from all clients.

Applicable Code Provisions

• **DR 4-101** (Preservation of Confidences and Secrets of a Client)
• **DR 5-105** (Refusing to Accept or Continue Employment If the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer)

Inquiry

The inquiring lawyer has been retained to represent the promoter of a tax shelter in litigation in the Tax Court contesting a ruling by the Internal Revenue Service disallowing the tax benefits of the shelter venture and with respect to resulting notices of deficiency issued by the Service to the promoter and other investors in the venture. The inquirer asks if, upon full disclosure of the risks of joint representation to both the promoter and investors, and upon obtaining the consent of all concerned, he may represent both the promoter and individual investors in the venture in contesting the action taken by the Service. The inquirer, the promoter and the investors all recognize that the possibility exists that the promoter and the investors may at some future date wish to take inconsistent positions in the Tax Court proceeding and that, in that proceeding, or in another proceeding, their positions may become adverse, but such conflicts in position have yet to arise, and the present intention of the promoter and the investor is to take consistent positions opposing the ruling by the IRS.

Discussion

As described in our recent Opinions 140 and 143, situations in which joint representation is being considered are governed by DR 4-101 (relating to the preservation of confidences and secrets) and DR 5-105 (relating specifically to conflicts of interest). DR 4-101 is qualified by the provision of section (C)(1) of the rule that confidences and secrets may be disclosed with the informed consent of clients involved. DR 5-105(C) also contains a consent provision, but even when consent is obtained the rule only permits joint representation when it is "obvious" that the lawyer can "adequately represent the interest of each" client.

Our recent opinions have consistently concluded that a lawyer's determination of whether representation is "adequate" in a particular situation is governed, in part, by the objectives and purposes of the clients involved and that "adequate" representation does not necessarily require the most aggressive or complete representation imaginable. *See, e.g.*, Opinion 49. However, applying Rule 5-105(A), as well as the appearance of improprietary standard of DR 9-101, we and the courts have uniformly recognized that a lawyer can never provide "adequate" representation if the interests and purposes of two or more clients are actually adverse or it is clearly unavoidable that they will prove to be so. *E.g.*, *Westinghouse* v. *Kerr-McGee*, 580 F.2d 1311 (7th Cir. 1978); *Cinema 5 Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). Thus, if a lawyer were to find himself in a situation in which his clients would want him to take opposing positions in the course of the representation, or if that is

clearly unavoidable, the lawyer may not provide joint representation—even if both clients were to seek and consent to it.

As we understand the facts presented, the inquiring lawyer is not yet at this point. No conflict now exists with respect to the position to be taken in the Tax Court. Both the promoter and the investors wish to take the position that the tax benefits claimed for the venture by the promoter were proper. It is, of course, possible that differences in position may arise both in the Tax Court proceeding or in other proceedings. In the Tax Court the promoter may want to rely on the Fifth Amendment as a bar to his examination; the investors may desire that his testimony be taken. The investors may also want to assert a theft loss deduction. Depending in part upon the results of the Tax Court proceeding, it is also possible that the investors may at some point decide to assert an action for damages against the promoter.

Nevertheless, at the present time the promoter and the investors are united in their opposition to the Service. Also, should the promoter and investors succeed in overturning the initial position taken by the Service, it is unlikely that any occasion for taking or asserting adverse positions would arise. If the inquiring lawyer is successful in assisting the promoter and investors to achieve thier common purpose, presumably they will live together happily for at least the foreseeable future.

Thus, in our view the inquirer is in that middle ground between situations where no possible conflict can be foreseen (and consent need not be obtained) and where a conflict is so clearly unavoidable that even informed consent will not suffice to permit the proposed joint representation to be undertaken. In this case, on the facts as we understand them, the lawyer is not absolutely barred from attempting the representation proposed, but he may represent both the promoter and investors only if they are fully informed as to the limitations and risks of the representation and they all provide uncoerced consent to the representation after such full disclosure is provided.

In particular, the prospective clients should be made aware that any confidences or secrets provided to the lawyer will, in effect, have been disclosed to the lawyer representing their fellow clients, and that there is a considerable risk in the circumstances of this case that if the joint client should later find themselves in conflict the lawyer may be forced to withdraw from representing any of them. If, however, despite such disclosures, the promoter and investors provide knowing and uncoerced consent to joint representation of their common position by the inquirer, he may undertake such negotiations so long, and only so long, as the position to be asserted on behalf of his clients remains common.

Inquiry No. 85-4-18
Adopted July 16, 1985

Opinion No. 158

Representation Against a Former Client in a Divorce Proceeding

• An attorney who previously represented both spouses in family and financial matters and one spouse separately as to a tax matter may later represent the other spouse in a divorce action only if the spouse previously represented provides uncoerced consent to the representation after full disclosure of the possible use that might be made of any confidential information previously disclosed to the inquirer.

Applicable Code Provisions

• **DR 4-101(B)** (A Lawyer Shall Not Knowingly Reveal A Confidence or Secret of His Client nor Use a Confidence or Secret of His Client to the Client's Disadvantage)

• **DR 7-101** (Representing a Client Zealously)

• **DR 9-101** (Avoiding the Appearance of Impropriety)

Inquiry

The inquiring attorney asks whether she may represent one spouse (W) in a divorce action after she has previously represented both spouses in matters involving factual information potentially relevant to the divorce proceeding and the other spouse (H) separately in a matter also involving information potentially relevant to the divorce. The inquirer's previous representation included writing wills for both spouses, advising both about joint investments and drafting documents to transfer property to their child. In addition, she represented H in negotiations with the Internal Revenue Service concerning an unpaid tax obligation incurred during a year in which H and W were married but filed separate returns. The inquirer ceased representing H and W when they moved to another state. H has now returned to the District of Columbia, and it is here that W, who still resides elsewhere, intends to file for divorce.

The inquirer states that she learned many confidences and secrets concerning H and W while she was their joint representative, and she also became privy to confidences and secrets while representing H in the tax proceeding. However, the inquirer does not believe she learned any information about H that W also does not know, but she is not certain on that point.

Discussion

Disciplinary Rule 4-101(B) through (C)(1) relates to the use and disclosure by a lawyer of confidences or secrets imparted to the lawyer by a client. The Rule provides in relevant part:

> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
> (1) Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them.

It has been uniformly concluded that Rule 4-101 outlives the employment relationship and requires the attorney to protect the confidences or secrets of former as well as current clients. *See* Committee Opinion No. 128 (1983); ABA Informal Opinion 1301 (1975).

Although DR 4-101 does not relate explicitly to the propriety of successive representation, the Rule comes into play when the successive representation would or might result in the use of a confidence or secret imparted to the lawyer by the former client either "to the disadvantage of the [former] client" or to "the advantage . . . of a third person. . . ." Since DR 7-101 requires that a lawyer represent clients "zealously" and "seek the lawful objectives of his client through reasonably available means," it is presumed that a lawyer will make use of all useful information in her possession in the course of representing any client she undertakes to represent. Thus, the threshold question in a subsequent representation situation is whether in the course of an earlier representation the lawyer actually or presump-

tively came into possession of information that would prove useful to the subsequent client.

The courts have applied the so-called "substantial relationship" test to identify those situations in which confidential information useful in a contemplated representation will be presumed to have been imparted in the previous representation. Employing that test, the courts have held that confidential information relevant to the contemplated representation will be presumed to have been conveyed to the lawyer during the previous representation if the subject matter of the previous representation is substantially related to the issues involved in the current representation. *See, e.g.*, *Brown* v. *District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 48-49 (D.C. App. 1984);[1] *Westinghouse Electric Corp.* v. *Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978); *T.C. Theatre Corp.* v. *Warner Brothers Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953).

While the inquirer believes she does not know any confidences or secrets that are not known by both H and W, she does not know that to be true. In any event, as held in *Brown* v. *District of Columbia Board of Zoning Adjustment*, *supra*, the actual state of her knowledge is immaterial if a "substantial relationship" between the earlier and contemplated representations is found to exist:

> [I]n cases where . . . the factual contexts of . . . two (or more) transactions overlap in such a way that a reasonable person could infer that [an] attorney may have had access to information legally relevant to, or otherwise useful in, the subsequent representation, we conclude that . . . a *prima facie* showing that the transactions are substantially related [will have been made]. The burden of providing evidence that no ethical impropriety occurred will then shift to the . . . attorney, who must rebut [the] showing by demonstrating that he or she *could not have* gained access to information during the first representation that might be useful in the later representation. . . .
>
> It is important to stress that the attorney *cannot* meet this burden simply by claiming that no useful information was, in fact, received in the first matter. If the fact finder is persuaded that the two matters are substantially related—i.e., that it is reasonable to infer counsel received information during the first representation that might be useful in the second—there arises a conclusive inference that useful information was, in fact, received. . . . Rebuttal evidence must therefore focus on "the scope of the legal representation" involved in each matter "and not on the actual receipt of . . . information." *Id.*, at 49-50, quoting *Westinghouse Electric Corp.* v. *Gulf Oil Corp.*, 588 F.2d 221, 224 (7th Cir. 1978). (Emphasis added.)

In the present situation it appears clear that the matters about which H and W were jointly represented by the inquirer, and about which the inquirer separately represented H, are substantially related to issues that are likely to arise during the divorce action. The inquirer states that among the issues to be resolved in the divorce are child custody and support, alimony and division of property. It is, therefore, highly likely that information imparted in the course of the previous investment, tax, property and estate representation will prove relevant to the negotiation and litigation, if necessary, of the issues that will arise in the contemplated divorce representation.

Thus, since in the circumstances of this case we conclude that a substantial relationship does exist between the inquirer's prior representation of H (both jointly and separately) and her contemplated representation of W, and no facts concerning the nature of the prior representation have been presented that would rebut that conclusion, it is clear that the inquirer may not represent W unless H's consent is sufficient to overcome the *prima facie* bar to representation and such consent is obtained. The fundamental question at issue is whether even such consent, if obtained, is sufficient to permit the representation.

Each of the prohibitions against revelation and use of confidences and secrets of clients provided in DR 4-101(B) (1) through (3) is subject to the prefatory condition that they are and remain in force "except when permitted under DR 4-101 (C)." Rule 4-101(C) (1) provides that "a lawyer may reveal . . . confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them." Thus, the rule upon which the *prima facie* bar to representation is based embodies the concept of consent and provides no additional bar to representation once such consent is obtained.[2]

Consistent with the language of Rule 4-101, the state bar ethics committees of Maryland (Opinion 81-51), Connecticut (Formal Opinion 33), Michigan (Opinion CI-878) and Kansas (Opinion 80-43) would permit the inquirer to represent W on the facts presented in this case upon obtaining informed and uncoerced consent from H. Likewise, in *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 89 (5th Cir. 1976), the court of appeals held that the former client should be the ultimate judge of whether a necessity of disqualification exists, and if the former client detects no detriment to him in his former counsel's representation of his present adversary, the "former client may consent to the employment of the attorney by [the] adverse party even where the [previous] client is involved in the [new] case as a party." *Accord Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920, 926 (2d Cir. 1954).

We also note that the draftsmen of Rule 1.9 of the Model Rules of Professional Conduct[3] appear to believe that the Model Rules, now under consideration for adoption in this jurisdiction, would permit subsequent representation adverse to a former client in a substantially related matter if informed consent were obtained. As a basis for adopting this position, the draftsmen's comment reasons that "Disqualification from subsequent representation is for the protection of clients and can

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[1]Although the *Brown* decision dealt with DR 9-101(B) (the so-called "revolving door" rule) instead of DR 4-101(B), the court of appeals explicitly found the same "substantial relationship test" to be applicable under both rules. *Id.* at 48.

[2]In contrast, DR 5-105 (C), which determines the propriety of *concurrent* joint representation provides two separate preconditions to representation: (1) informed consent *and* (2) a determination by the lawyer that "it is obvious that he can adequately represent the interest of each."

[3]Model Rule 1.9, Conflict of Interests: Former Client, provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 [re confidentiality and permissible disclosure of information] would permit with respect to a client or when the information has become generally known.

be waived by them." It also cautions that such a waiver "is effective only if there is disclosure of the circumstances, including the lawyer's intended role on behalf of the new client."

In contrast, the state ethics committees of Kentucky (Opinion E-245), South Carolina (Opinion 81-22), Vermont (Opinion 80-21), Illinois (Opinion 701) and Alabama (Opinion 84-186) would apparently bar such representation, even upon consent, where confidential information conveyed or presumed to have been conveyed during the prior representation could be used to the disadvantage of the former client. In reaching that conclusion, these committees appear to have superimposed an additional "appearance of impropriety" standard based on DR 9-101 over the prohibitions and conditions stated in DR 4-101.

This committee concludes that we should limit ourselves to applying the language and purposes of Rule 4-101 in resolving this question. It appears to us, as it did to the Courts of Appeals for the Fifth and Second Circuits and the draftsmen of the Model Rules, that the primary purpose of the prohibition against use of client confidences against a present or former client is to protect such clients from *unauthorized* use of such confidences. Given that the privilege of confidence belongs to the client and is intended for the client's protection, the client should retain the power to preserve or waive enforcement of the confidential relationship.

We are aware, of course, that the "appearance of impropriety" standard of Canon 9 has been invoked to prevent the same lawyer or law firm from *simultaneously* representing adverse clients, even when consent is given. *E.g.*, *Westinghouse* v. *Kerr-McGee*, 580 F.2d 1311 (7th Cir. 1978); *Cinema 5 Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). Such simultaneous representation puts a lawyer in the same case in the impossible position of arguing both sides against each other, and we have no doubt that even consent should not permit such representation to occur. However, we do not find *subsequent* representation adverse to a *past* client to present disqualifying considerations of public appearance where the informed consent of the prior client has been sought and obtained. *Accord In re Yarn Processing Patent Validity Litigation*, *supra*, 530 F.2d at 89-90. The lawyer in such situations has only one loyalty, and, given the informed consent of the former client, there is no conflict of interest barring zealous representation of the client the lawyer now represents.

We conclude, then, that since DR 4-101(C) explicitly provides that a past client may consent to disclosure of confidential information, a past client should also be permitted to consent to a future adverse representation which would only be precluded by the necessity of preserving and misusing the confidences or secrets of the former client. In our view, the right to consent to disclosure of confidential information carries with it the right to consent to disclosure of information for use in an adverse representation as well as in benign or neutral circumstances.

We would emphasize, however, that such consent must be fully informed and must not be coerced in any way. In particular, the former client must be informed that the lawyer's obligation under Canon 7 to represent his new client zealously precludes the lawyer from imposing any restrictions on the use to be made of whatever confidences she obtained from her former client. Before giving consent, the past client must be made to understand that any information previously provided to the person who was his lawyer may now be used against him and be reminded of the types of relevant information that had previously been made available to the lawyer who will now be the representative of his adversary. The prior client must be made to understand that, given consent to the proposed representation, the lawyer will not only be free to make use of such information against the former client, but the lawyer is *obligated* to make use of such information in aid of the new client if the contemplated representation is undertaken. It is not possible in the course of a representation for a lawyer to impose blinders on a portion of her memory, and the former client should be made to understand that fact.

The lawyer must also disclose to the former client all other factors necessary to permit the former client to make an informed decision. For example, the lawyer should explain that there are many issues that arise in a divorce proceeding, such as division of assets, custody of children, individual tax considerations, sequestration of assets, potential rights to pension benefits and the like, as to which information gained in the prior representation may prove relevant and with respect to which, if consent is provided, the lawyer will now be representing solely W and not H. In addition, the lawyer must take all steps necessary to assure that no coercion is applied in seeking the former client's consent to the proposed adverse representation. In order to achieve that assurance, as well as to insure that any consent provided is "informed," in most cases the former client should be cautioned that he may wish to obtain or consult a new lawyer before consent is provided.

Inquiry No. 84-9-29
Adopted September 17, 1985

Opinion No. 159

Representation of Cooperative Association and Its Members

• An attorney who represents a cooperative association does not thereby also represent each of its members, even though the attorney's fees are paid in whole or in part from the dues of the members. The attorney is not, however, automatically precluded from representing individual members of the association, except in relation to a dispute by the member against the association. Conversely, the fact that the attorney's fees are paid in whole or in part from member dues does not necessarily preclude the attorney from representing the association against one or more of its members.

Applicable Code Provisions

• **DR 5-101 (A)** (Representation Affecting Personal Interests)
• **DR 5-105(B)** (Representing Clients with Differing Interests)
• **DR 5-105(C)** (Exceptions to DR 5-105(B))
• **DR 7-104(A)(2)** (Advice to Person with Adverse Interest to Client)
• **EC 5-18**

Inquiry

An attorney who represents a cooperative association asks whether he can also represent: (a) a member of the association in a dispute against another member of the association; (b) a member of the association against a director of the association; or (c) the association against a member of the association.

Discussion

The inquiry results, in part, from the inquirer's premise that because he represents a cooperative association (formed pursuant to D.C. Code §29-1101, *et seq.)*, and because the association is supported by the dues of its members, he also represents "each and every member" of the association. This inquiry is most easily analyzed if this premise is treated first.

1. The Actual Client

The inquirer's premise is not correct; that his representation of the association also makes him the attorney for each of the association's members. Pursuant to D.C. Code §29-1101(1), a cooperative association is a non-profit corporation,[1] and EC 5-18 of the Code of Professional Responsibility states, in pertinent part, with respect to representation of corporations:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgement should not be influenced by the personal desires of any person or organization.

Accordingly, the inquirer's ethical responsibility is to the association. Because the association is a legally distinguishable entity from each member, the inquirer's service as attorney to the association does not also make him the attorney for each of its members, and the attorney's representation of any member would have to be by separate agreement.

The outcome of this inquiry is not affected by whether the members' dues are the *sole* source of the entity's revenue from which the attorney's fees are paid—as they may be in a cooperative association—or merely *one* source of the entity's revenue—as they are in many non-profit corporations and, ideally, in all for-profit corporations. Once the member's dues become an association asset, they lose their individual identity and are not distinguishable for this purpose from other sources of revenues. Thus, the fact that the association members pay dues from which the attorney's fees are paid is not distinguishable, for present purposes, from the fact that a corporation pays its attorneys, in part, from the funds provided by its stockholders—in neither case does the attorney who represents the entity, by virtue of that representation, also represent each person who funded the entity. Instead, the outcome of this inquiry depends solely upon the fact that the members and the association are legally separate entities, irrespective of whether the association obtains revenues other than from members.

[1]The Committee assumes that the inquirer is asking about a District of Columbia cooperative association.

Having determined that the association is the attorney's client, and that representation of the association does not constitute representation of its members, the next issue is whether the attorney can participate in the specific scenarios presented in the inquiry.

2. Member Against Member

Regarding whether the inquirer can represent a member of the association in a dispute against another member, the threshold issue is whether the inquirer can represent a member *at all*. DR 5-105(B) provides that the attorney cannot represent both the association and one of its members: (a) if the attorney's independent professional judgment in behalf of either the association or the member "will be or is likely to be adversely affected" by his representation of the other; or (b) if representing both the association and one of its members "would be likely to involve him in representing differing interests." DR 5-105(C) provides an exception to DR 5-105(B):

> ...if it is obvious that the attorney can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

As stated in EC 5-18:

> Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

Unless the tests in DR 5-105(B) are met, or unless the exception in DR 5-105(C) is available, then the inquirer cannot represent a member *at all*. The determination, of course, would have to be made on a case-by-case basis with respect to each member for each situation presented. If the inquirer cannot represent the member in any given situation, then DR 7-104(A)(2) further provides that the inquirer cannot give *any* advice to that member in that situation, other than the advice to secure counsel, "if the interests of [the member] are or have a reasonable possibility of being in conflict with the interests of [the association]."

If, on the other hand, the tests in DR 5-105(B) are met, or if the exception in DR 5-105(C) is available for any given situation, the inquirer can represent the member in that situation. In that event, the next issue is whether the inquirer can represent the member against another member in that situation. This inquiry requires the same case-by-case analysis that would be necessary in relation to the inquirer's representation of the member against *any* person or entity, and the analysis may be, but is not necessarily, affected by the fact that the prospective adversary is also a member of the association.

3. Member Against Board

The outcome of this portion of the inquiry depends upon whether the prospective adversary is an *individual* member of the Board, or the *entire* Board as an entity. In the case of representation against an individual director, the analysis would be the same as in the member versus member analysis in the previous section, with particular attention in this instance to the constraints imposed by DR 5-101(A), which provides:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interest.

If the member seeks the inquirer's representation against an individual director who is particularly influential on the Board, for whatever reason, then the inquirer might justifiably fear retaliation by the association, i.e., retaliation by the Board, for his or her representation of the member against the individual director. Pursuant to DR 5-101(A), of course, the client could "consent...after full disclosure" to representation by the inquirer in the face of this potential retaliation (which retaliation could include termination of the inquirer's status as counsel for the association); but without such consent, the potential for retaliation could affect the inquirer's professional judgment sufficiently to prohibit representation under DR 5-101(A) if the target director were sufficiently influential.

In the case of representation against the entire Board, the analysis would probably preclude representation of the member because the Board *is* the association for this purpose, and the inquirer's representation of the association is tantamount to representation of the Board. Thus, by supposition that the member's claim is against, and therefore in conflict with, the Board, the

inquirer probably cannot (a) represent the member, because of DR 5-105(B), or (b) give any advice to the member except the advice to seek counsel because of DR 7-104(A)(2).

4. Association Against Member

Regarding whether the inquirer can represent the association against one or more of its members, the essential conclusion is that, for the reasons stated above, the association is the client, rather than each of its individual members. As noted above in reaching that conclusion, members' dues lose their individual identity once they become an association asset, and they become indistinguishable from the association's other sources of revenues, if any. Thus, the fact that the inquirer's fees would be paid in whole or in part from members' dues does not, in and of itself, preclude the inquirer from representing the association against one or more of its members. Having concluded that such representation is not automatically forbidden, the same case-by-case analysis that is necessary in relation to the representation of *any* client would be required.

Inquiry No. 85-6-26
Adopted September 17, 1985

Opinion No. 160

Practice of Law in a Law Firm Where Partners Have Been Suspended

• An associate may not continue to practice law for a firm where the partners of the firm have been suspended from practice, and may not continue to seek the legal advice or assistance of the suspended lawyers. The associate may share office space and expenses with suspended lawyers, but only if it is clear from the circumstances that the associate has no relationship with the suspended lawyers relating to the practice of law.

• A lawyer may accept responsibility for handling the unfinished cases of a suspended lawyer if: (1) the client voluntarily elects to be represented by that lawyer; and (2) the lawyer does not divide his fees or pay any referral fee to the suspended lawyers.

Applicable Code Provisions

• **DR 1-102(A)(4)** (Conduct involving Dishonesty, Fraud, Deceit, or Misrepresentation)

• **DR 3-101** (Aiding Unauthorized Practice of Law)

• **DR 3-102** (Dividing Legal Fees with a Non-Lawyer)

Inquiry

The inquiring lawyer is an associate in a small law firm where the partners face suspension from the practice of law for a period of one year and a day for violation of the Code of Professional Responsibility. The inquiry essentially seeks answers to the following questions:

1. May the inquiring lawyer continue to practice law as an associate in the offices of a firm during the period of the partners suspension from practice?
2. May the lawyer seek the approval or advice of a suspended partner regarding decisions made for the firm's clients?
3. May the lawyer share office space and expenses, such as secretarial and library expenses, with the suspended lawyers?
4. May the lawyer become a signatory on the firm's bank accounts or disburse monies on its behalf?
5. May the lawyer represent clients formerly represented by the law firm, after securing the client's approval?
6. If the lawyer takes over a case from the firm with the client's approval, may he pay the firm a referral or other fee, and if so, on what must the fee be based?

Discussion

1. Lawyer's Practice of Law With a Suspended Lawyer

The first four questions raise the issue of whether a lawyer may maintain a relationship with lawyers who have been suspended from practice. The governing disciplinary rule is DR 3-101(A), which provides that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." We must consider two issues: whether a suspended lawyer is a "non-lawyer" within the meaning of this rule; and if so, what conduct would "aid [the suspended lawyer] in the unauthorized practice of law."

The rationale for DR 3-101(A) is spelled out in the Ethical Considerations accompanying Canon 3. EC 3-1 provides:

> The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC 3-3 provides:

> A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. . . .

Thus, the primary concern underlying DR 3-101(A) is the need to assure the public that legal matters will be entrusted to persons with both legal competence and a commitment to high standards of ethical conduct.

In light of this concern, a lawyer whose license has been suspended for a year and a day for violation of ethical rules must be considered a "non-lawyer" within the meaning of DR 3-101(A). *See* ABA Informal Op. 628 (1962) (disbarred lawyers are the same as laymen and so may not share legal fees for work performed after disbarment). Whatever may be the case for a lawyer given a short-term suspension, the purpose and the length of the sanction at issue here demonstrate that the attorney has lost his claim to be treated any further as a lawyer. Indeed, under Section 3 of D.C. Bar Rule XI, an attorney suspended by the Court for more than one year must prove rehabilitation in a reinstatement proceeding to resume practice.

It follows that the inquiring lawyer may not aid the suspended lawyers in the "practice of law." The drafters of the Code found that "[i]t is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law." EC 3-5. However, it is obvious that holding oneself out as a law firm authorized to practice law, to answer the inquirer's first question, and exercising the responsibility to approve decisions on legal matters undertaken on behalf of a client, to answer his second question, constitute the practice of law.[1]

[1]As we noted in Opinion No. 52, state and local statutes, court rules, and cases generally provide guidance as to what is considered the unauthorized practice of law. The applicable District of Columbia provision, D.C. Court of Appeals Rule 49(b), defines the practice of law

Accordingly, if the inquiring lawyer were to remain in the employ of the law firm, he would be aiding the suspended lawyers in the unauthorized practice of law. Similarly, the lawyer would be aiding the suspended partners in the unauthorized practice of law if the partners retained authority to approve actions taken on any client's behalf, or if they rendered legal assistance or advice.[2]

Two informal opinions of the ABA's Committee on Ethics and Professional Responsibility support this result. In Informal Opinion 1079 (1968), the Committee stated that "[a] lawyer may not be associated with a person who is suspended from the practice of law," although a suspended lawyer may work for a licensed lawyer if he has no contacts with clients or direct involvement in legal proceedings. In Informal Opinion 1162 (1970), the Committee stated that suspended attorney Z, the sole partner in a law firm named after dead partner X, could not maintain his office during the period of suspension by hiring a young lawyer to run it:

> The young lawyer who would be running the X office would be in fact an employee of the suspended Z, which would be improper irrespective of the person to whom the client talked and irrespective of the person to whom the fees were paid. By the suggested arrangement, Z would be able to maintain a law practice preserving his clients and the continued existence of his one-man law firm. Whether or not he can do this under [state] law . . . is not a question for this Committee but *we do not think that the young lawyer in good standing can be involved in such an arrangement without violating the Code of Professional Responsibility* and Informal Opinion 1079. (Emphasis added.)

This result also is supported by a recent informal advisory opinion rendered by the Virginia State Bar Committee on Legal Ethics. The Virginia Committee concluded that a lawyer would violate the State Code of Professional Responsibility if he were to continue the practice of the firm during the time that the firm's partners are suspended.

It does not follow, however, that the lawyer is precluded from sharing office space or expenses with the suspended lawyers. As the Virginia Committee stated, the lawyer:

> might maintain an independent practice in the current office facilities of the suspended partners and . . . pay office expenses incident to [his] independent practice there; provided, however, that all indicia of the law firm must be removed and that [the lawyer] be exceedingly careful to avoid even the appearance that [his] law practice is associated in any way with that of the . . . suspended attorneys.

We agree with this formulation. We see no bar to the sharing of office space or expenses, provided that the inquiring lawyer does not in any way convey the impression that he is practicing law with or on behalf of the suspended lawyers. *See* ABA Informal Op. 1079, *supra*. This same caution applies to the lawyer's becoming a signatory on the law firm's bank accounts or making disbursements on its behalf.

2. Representation of The Law Firm's Clients and the Division of Fees

The inquiring lawyer, of course, may represent persons who were clients of the law firm if the client voluntarily elects to employ the lawyer and he is able to provide them adequate representation. The suspended partners similarly may recommend to their clients that they retain the inquiring lawyer, assuming, again, that he is able to provide them adequate representation.[3] However, since a lawyer may not (except under limited circumstances not applicable here) divide legal fees with a non-lawyer, DR 3-102, the suspended lawyers may not receive any legal fees for services performed after the suspension. Nor may they be paid any forwarding or referral fee. *See also* Opinion No. 65 (even legal fees among lawyers of different firms may be shared only according to the work performed and responsibility exercised by each).

Inquiry No. 85-3-12
Adopted September 17, 1985

broadly to include, for example, holding oneself out as authorized to practice law, "preparing pleadings of any kind in any action brought before any court, or preparing or expressing formal opinions or consulting with respect to any of the foregoing or on any other matters of law."

[2]In addition, the inquiring attorney would violate DR 1-102(A)(4), which provides that a lawyer shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." By associating himself with the firm, the lawyer at least tacitly would be misrepresenting to clients that the firm is authorized to practice law in the District of Columbia.

[3]Under Section 19 of D.C. Bar Rule XI, the suspended attorneys are required, *inter alia*, to notify their clients promptly of the suspension and that it will be necessary for them to seek legal advice elsewhere or substitute counsel in a pending proceeding.

Opinion No. 161

Contingency Fees in Child Support Cases

• Under the Disciplinary Rules applicable to the District of Columbia, there may be situations where an attorney ethically can enter into a contingency fee arrangement providing for payment of a fixed fee to the attorney if child support is obtained. However, a contingency fixed fee arrangement that results in a "clearly excessive" or unreasonable fee would be unethical.

Applicable Code Provisions

• **DR 2-106(A), (B)** (Illegal or Clearly Excessive Fee Prohibited)
• **DR 5-103(A) (2)** (Reasonable Contingent Fee in Civil Case Allowed)
• **DR 1-102 (A) (4)** (Misrepresentation Prohibited)
• **DR 7-102(A)** (False Statements, Improper Concealment, Creation of False Evidence Prohibited)

Inquiry

This inquiry presents two basic questions. The first is whether a lawyer ethically can enter into a fee arrangement in a child support case where a fixed fee is contingent upon court-ordered payments and is deducted from those payments. The second issue is whether the particular fee here involved would be unethical even if, as a general rule, contingency fixed fee arrangements in child support cases are not.

This matter was brought to us by Bar Counsel. The attorney who is the subject of the inquiry contracted for a $1,300 fee that was due only if the Superior Court made a child support award. Under the agreement, the attorney's fee is paid from the support payments at the rate of fifty percent of those payments per month until the entire amount due is satisfied. The court ordered the opposing spouse to pay the client $200 a month for child support. The court also awarded the client $150 in attorney's fees. It appears that the court was not aware that the contingency fee contract existed.

Fee awards in domestic relations cases are provided for by D.C. Code §§ 16-911 and 16-916. "Counsel fees" are part of the "suit money" that a court may award a spouse "to enable" the spouse "to conduct the case."

Discussion

The following disciplinary rules are pertinent to the contingency fee issue:

- DR 2-106(A): "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."
- DR 2-106(B): "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee..."
- DR 5-103(A)(2):"A lawyer...may ...[c]ontract with a client for a reasonable contingent fee in a civil case."

In addition, two ethical considerations are particularly apposite:

- EC 2-20: "...Because of the human relationships involved and the unique character of the proceedings, contingency fee arrangements in domestic relations cases are rarely justified..."
- EC 5-7: "...Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to a client."[1]

DR 2-106(A) makes illegal fees unethical, and thus an initial question is whether the fee involved here is illegal. Such a fee would be illegal as contrary to public policy (and thus unethical) in various states. *See Professional Responsibility-Contingent Fees in Domestic Relations Actions: Equal Freedom to Contract for the Domestic Relations Bar*, 62 N.C. L. Rev. 381 (1984). One rationale for this conclusion is that contingency fees frustrate a court's efforts and ability to make equitable child support awards. However, neither statute nor court decision has made such fees illegal in the District of Columbia. Nor is there any District of Columbia disciplinary rule or opinion by this committee that proscribes such fees.

We thus cannot conclude that contingency fees in child support cases are always unethical in the District of Columbia. This conclusion is buttressed by the fact that "reasonable" contingency fees generally are permitted by DR 5-103(A)(2).

We realize that this conclusion is at odds with EC 2-20, which indicates that contingent fee arrangements in domestic relations cases are rarely justified. It is also inconsistent with the state rulings that such fees are both illegal and unethical.[2] Nonetheless, we believe that, in the absence of District of Columbia authority making such fees illegal, and in the absence of a specific, controlling disciplinary rule, we cannot find such fees unethical in every circumstance.

The fact that contingent fees generally are allowed in situations such as wrongful death and medical malpractice cases—which often concern difficult human situations and the maintenance of disabled persons or survivors—bolsters our conclusion that such fees are not prohibited in every child support case. While a contingency fee in a child support case does take from the funds that could be used for the child's welfare, a contingency fee in a medical malpractice case extracts money from an injured party in a situation where the award may be the sole or principal means of support. Moreover, to allow child support contingency fees may make the counsel of choice available to persons of limited means. *See* EC 5-7.

Still remaining is the question whether the particular conduct involved in this case is unethical. There are two issues to be considered in this regard: (1) Was the fee charged clearly excessive or unreasonable? *See* DR 2-106(A)&(B), DR 5-103(A)(2); (2) Was it unethical for the attorney not to inform the court making the fee award that the contingency fee arrangement existed?

DR 2-106(B) provides in full text that:

> A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> (3) The fee customarily charged in the locality for similar legal services.
> (4) The amount involved and the results obtained.
> (5) The time limitations imposed by the client or by the circumstances.
> (6) The nature and length of the professional relationship with the client.
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
> (8) Whether the fee is fixed or contingent.

We do not have enough facts to reach "a definite and firm conviction that the fee is in excess of a reasonable fee." We do know that the fixed fee was $1,300. Assuming that the $150 awarded by the court was deducted from that amount, the client was obligated to pay $1,150 to the attorney from child support payments. At the agreed rate of fifty percent of the $200 monthly child support payments, the attorney would collect one-half of the payments for virtually one year. If the client and child were in meager circumstances and if the payments were the child's principal means of support, a question could arise as to whether the fee was clearly excessive and unreasonable. *See* DR 2-106(B), which states that "[t]he amount involved and the results obtained" should be considered in determining whether a fee was in excess of a reasonable fee.

More generally, we note the danger of an arrangement, like the one here, where a fixed fee is contingent not on the *amount* of support, but upon obtaining *any* support. Where the fixed contingent fee contracted for is large, but the support actually obtained is small, a clearly excessive, unreasonable fee could result.

In addition, other factors specified in DR 2-106(B) appear particularly relevant in determining whether the fee here is excessive. If little time, labor or skill were involved, and if the case involved no novel or difficult questions, the fee might be questionable. *See* DR 2-106(B)(1). If the fee exceeds that "customarily charged" in the District of Columbia "for similar legal

[1] Also noteworthy is Model Rule 1.5(d)(1), which reads: "A lawyer shall not enter into an arrangement for, charge, or collect...any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof."

[2] A question exists as to whether a fixed contingent fee payable if any support is obtained is contrary to Model Rule 1.5(d)(1), which prohibits fees "contingent...upon the *amount* of...support." In the present situation—where the monthly fee amount is contingent on the monthly amount of support—the Model Rule, if applicable, might be contravened.

services," it could be improper. *See* DR 2-106(B)(3). That this case (as we assume) did not "preclude other employment by the lawyer" is also relevant in determining whether the amount charged was excessive. *See* DR 2-106(B)(2).

The final question is whether the attorney, when seeking both child support and a fee award, acted improperly in failing to inform the court that the contingency fee agreement existed.

A person seeking child support is required to file with the court a Financial Statement listing his or her income, expenses, assets and liabilities. It appears that no court has interpreted the requirement to list "liabilities" as a mandate to reveal the legal fees owed, but this conclusion would not seem unreasonable and some attorneys see to it that such information is included.[3]

If the courts subsequently rule that legal fees must be included on the statement, an attorney then would have an ethical obligation to ensure that this is done. Moreover, at present it clearly would be improper to misrepresent the fee situation if a court inquired about it. *See* DR 1-102(4), which provides that "[a] lawyer shall not... [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *See also* DR 7-102(A), which states that "a lawyer shall not...

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
(4) Knowingly use perjured testimony or false evidence.
(5) Knowingly make a false statement of law or fact.
(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

We also believe that an attorney has an ethical duty to disclose a fee arrangement to the court if such disclosure would enable the client to obtain increased child support or the attorney's fees allowed by D.C. Code §§ 16-911, 16-916. In addition, where it is in the client's interest, an attorney in a child support case has an ethical obligation to seek attorney fees under these provisions from the opposing party. *See* DR 7-101 and DR 6-101.

Inquiry No. 85-1-6
Adopted November 19, 1985

[3]It is unclear whether a contingency fee not yet owed is a liability that should be listed. This committee, however, does not make rulings on matters of law and we thus do not decide what information must be included on the Financial Statement.

Opinion No. 162

Distribution of Fees Generated By a Matter From Which An Attorney is Screened

• Fees generated from a matter from which a lawyer is disqualified and screened pursuant to DR 9-102 may not be used for the personal compensation of that lawyer.

Applicable Code Provision

• **DR 9-102** (Imputed Disqualification)

Inquiry

The inquiring law firm has determined pursuant to DR 9-102(A) that one of its members is disqualified from participation in a matter being handled by the firm because he was personally and substantially involved in a closely related matter while employed by the government. Pursuant to DR 9-102(B), the lawyer has been screened from any participation in the matter so that his firm can undertake the representation. The firm asks whether it is permissible for the fees derived from this matter to be placed in the general pool of the firm's revenues so that some small fraction of the disqualified lawyer's expenses and compensation will be paid from fees generated by the matter from which he is disqualified.

The firm points out that it is a professional corporation and that all fees are placed in a common pool. That pool is used to pay expenses, including salaries of all the lawyers. Any amount that remains is treated as net profit, which is distributed to the officers of the professional corporation under an agreed formula. Under this formula, the disqualified lawyer would be given no credit for the origination of the matter from which he is screened or for the work performed on that matter. He would, however, benefit from the fees derived from the matter to the extent that they are included in the pool from which his expenses and salary are paid. While the firm has not provided any exact figures, it emphasizes that the fees derived from the matter are a very small percentage of both the firm's total revenues and the disqualified lawyer's expenses and salary.

Discussion

DR 9-102(B) prohibits a lawyer from "sharing in any fees resulting" from a matter from which he is screened. This inquiry requires the Committee to determine how this mandate is to be implemented.

I.

At the outset, we must determine what is meant by "sharing." The question is whether this term is so broad that a lawyer must not benefit even from the portion of a screened fee that goes toward paying the firm's overhead or whether the lawyer is barred only from receiving personal compensation from a screened fee. We are not aware of anything in the legislative history of the rule which sheds any light on this question. Thus, our analysis must rest on the practicalities of the problem. To require that a screened lawyer be divorced from the portion of a screened fee that goes to overhead would introduce accounting problems of considerable complexity, and we do not believe that the Court of Appeals intended to impose such difficulties on the bar.

Furthermore, it does not appear that such an interpretation would substantially further the purposes of DR 9-102. The rule is intended to avoid both the appearance and the possibility of real impropriety when a lawyer who has been involved in a matter while employed by the government goes to work for a firm that has a client involved in the same or a substantially related matter. These improprieties include use of confidential information or other insights gained while in government, possible influence with former government colleagues, and attraction of clients who believe that the lawyer can capitalize on his former government position. The rule rests on the assumption that these evils can be avoided by screening the former government employee. We do not believe that this screening device will be made any more effective by requiring the firm to compute the amount of the screened lawyer's overhead covered by fees generated from the screened matter, and to pay these fractional expenses from other sources.

Accordingly, we conclude that a screened lawyer is prohibited from sharing in any portion of a screened fee that goes toward the lawyer's personal compensation. This conclusion, however, is limited by a rule of reason and good faith. Thus, DR 9-102 (B) does not tolerate abnormal accounting practices or other devices to circumvent the rule's prohibition. For example, if a firm used revenues from a screened matter to pay for a special benefit to the screened lawyer which is not provided to other members of the firm, such as redecorating only his office or leasing a car for his predominent use, the intent of the rule would be violated.

Implementation of DR 9-102(B) is complicated by the variety of ways in which lawyers are compensated. Accordingly, a rule of reason and good faith must be applied to each individual situation. However, one general principle is universally applicable. If a screened lawyer's compensation exceeds what the firm would or could pay him if it were not receiving any income from the screened matter, the arrangement violates DR 9-102(B). With this general principle in mind, we set forth several examples of how firms using different methods of compensation can pay a screened lawyer without violating the disciplinary rule. We stress that these examples are by no means exclusive, but are intended to answer this specific inquiry to provide general guidance for the bar.

In firms where compensation is determined solely by the work which an attorney generates or performs, implementation of DR 9-102(B) is relatively simple: the attorney is not given any credit for the work from which he is screened. The inquiring firm is following this principle with respect to the distribution of what it characterizes as "net profit."

Complications arise where attorneys are compensated on a basis other than work performed or generated and it is more difficult to determine whether an attorney's compensation comes from a screened fee. For example, in some firms partners' compensation is determined strictly by the number of years they have been partners. In other firms, lawyers who have just come from government service, whether associates or partners, are paid a fixed salary for a certain number of years in order to prevent any possible violation of 18 U.S.C. § 203.[1] Finally, principals of a professional corporation, such as the inquiring firm, are paid a salary, but one which presumably is related to estimated income for the coming year.

When a partner's compensation represents a share of the firm's revenues that is unrelated to work performed or generated, the compensation of a screened lawyer can be calculated in the following manner. First, the firm determines what percentage of its gross income is available for distribution to partners. This percentage then is applied to the gross revenues generated from the screened matter in order to determine the amount that is attributable to overhead and the amount of profit that is unavailable to the screened attorney. At this point in the calculation, two arithmetical alternatives which lead to the same result are available. First, the sum which is unavailable to the screened attorney can be deducted from the pool from which he draws his compensation and put over into a secondary pool from which the unscreened partners draw. In the alternative, the sum which is unavailable to the screened attorney can be divided by the total amount available for distribution to partners, and the screened partner's compensation should then be reduced by this percentage.

This approach can be illustrated through the following example. Suppose that in a firm which has gross revenues of one million dollars, sixty percent goes to pay salaries of associates and support staff, rent, and other expenses, and forty percent is available for distribution to the partners. Assume further that $50,000 of gross revenue has been generated by a matter from which a partner is screened. Applying the profit-to-expenses ratio to this sum, $20,000 is available for distribution. Under the first alternative, this amount is deducted from the pool from which the screened lawyer draws his compensation and is divided among the other partners. Under the second alternative, this $20,000 represents .5% of the $400,000 which is available for distribution to the partners, and the screened lawyer's share should be reduced by .5%.

Again a rule of reason and good faith must be applied. If the screened lawyer's percentage of the pool from which he may draw is artificially inflated to compensate for the amount by which the pool has been reduced, such a practice would violate the intent of the rule.

With respect to a professional corporation, this same approach should be applied to the sum that is available for distribution to the principals either as salaries or as after-salary profit. Even though the principals' salaries are an expense of the corporation, the fact remains that these salaries are compensation for the principals just as the shares from a partnership are compensation for partners. Therefore, funds derived from a screened matter must be deducted from the pool from which the screened lawyer's salary is drawn.

Finally, there is the situation of an attorney who joins a firm upon leaving government service—whether as partner, associate, or of counsel—and is paid a fixed salary for a certain period of time in order to avoid sharing in any compensation for services rendered by the firm in matters covered by 18 U.S.C. § 203. Since section 203 covers a wider range of matters than DR 9-102(A) does, this fixed salary arrangement can also insure compliance with DR 9-102(B), provided that the rule of reason and good faith is observed. For example, if the salary does not bear any reasonable relationship to the work which the attorney actually does but appears to be based on the fees generated by matters from which he is screened, it will violate the rule.

The fixed salary arrangement is less likely to raise questions when the amount of money generated by screened matters is small in relation to the firm's total income. In these circumstances, there will be little concern that the screened lawyer is sharing in screened fees. However, when the income generated by screened matters is a large percentage of the firm's income, the propriety of the fixed salary approach will be open to greater question and the general principle articulated above should be applied—*i.e.*, if the salary is greater than what the firm would or could pay the screened lawyer if it were not receiving any income from the screened matters, the arrangement violates DR 9-102(B).

Inquiry No. 81-2-5
Adopted December 17, 1985

[1] *See* Jordan, Ethical Issues Arising From Government Service, in *Professional Responsibility: Guide for Attorneys*, 205-07. The Office of Government Ethics has issued several informal advisory opinions commenting on appropriate ways of complying with this statute. Nos. 84 x 3, 84 x 4, 84 x 9, 84 x 13, 85 x 3.

Opinion 163

Simultaneous Representation of Opposing Clients

• Where two matters are unrelated to each other, and there is no realistic prospect that information conveyed to a law firm by either client in the course of the matter in which it is represented will have any relevance to or other utility in the other matter, upon obtaining the informed and uncoerced consent of all clients involved, the law firm may participate as counsel for one client in a proceeding in which the other client is an opposing party.

Applicable Code Provisions

• **DR 4-101** (Preservation of Confidences and Secrets of a Client)

• **DR 5-105** (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer)

• **DR 7-101** (Representing a Client Zealously)

• **DR 9-101** (Avoiding Impropriety or the Appearance of Impropriety)

Inquiry

Early in 1985 a European office of the inquirer, a multi-office law firm, performed two hours of work on behalf of another law firm and an unidentified client of that firm providing general information regarding requirements for incorporation of a business in a European country. Subsequently, another office of the inquiring law firm, on behalf of one of its clients, brought an action for malpractice against the same firm that had obtained advice from the inquirer's European office. Neither the inquirer's client in the malpractice action nor the subject of that action has any relationship whatsoever to the advice sought from the inquirer's European office, and at the time the malpractice action was brought the office of the inquirer involved in the malpractice litigation was not aware that advice had been provided to the defendant in that action by the inquirer's European office. Although the inquirer has a computerized system for screening for conflicts, the previous consultation with the European office was not caught because, in the meantime, the law firm which had consulted with the European office and was sued in the malpractice action had changed its name.

Later, in 1985, while the malpractice action was pending, a partner of the law firm that is the defendant in the malpractice action visited the inquirer's European office and made further inquiries about the process of incorporating in a European country. Since it had previously provided advice to that firm on the same subject, further advice was provided without a further check for possible conflicts. Total time spent on the second European incorporation inquiry amounted to two hours, all of which has been billed and paid for, and the inquirer's European office has provided no further representation of the law firm or its unidentified client. Throughout these events the inquirer's European office was unaware that one of its United States offices was representing another client in a suit against its own client, and the United States office was unaware of the representation being provided to the defendant in the malpractice action by its European office.

Recently, as a result of a conversation with one of the partners of the law firm that is the defendant in the malpractice action, the inquirer's United States office became aware of the consultation between its European office and the defendant in the malpractice action. As a result of that revelation, the inquiring law firm informed its client in the malpractice action of its prior dealings with the defendant in that case, and the inquirer has offered to withdraw as counsel in the malpractice case. Nevertheless, the inquirer's client in the malpractice action has indicated that it would prefer that the inquirer remain as its counsel in the malpractice action, and the defendant in that action has indicated that it will consent to the inquirer's continued participation as counsel for its adversary in that case.

The inquirer asks whether, given the informed and uncoerced consent of all parties to the malpractice action, under the circumstances described, may it continue to act as counsel for the plaintiff in that case without violating any applicable disciplinary rule.

Discussion

Because two hours of the advice provided by the European office took place while the malpractice action was in progress, we treat this inquiry as one relating to simultaneous representation as differentiated from successive representation. This distinction is of material significance because DR 4-101, from which the "substantial relationship test" applicable to successive representation situations is inferred, explicitly provides for waiver upon informed consent (see Rule 4-101 (C)), whereas DR 5-105, applicable to conflicts between clients represented at the same time, explicitly provides that in some circumstances conflicts between existing clients are not subject to waiver by consent of the parties involved.[1]

On the facts presented, two of the disciplinary rules potentially applicable to a conflict case can be readily dismissed. DR 4-101, relating to preservation of confidences and secrets of a client, must always be considered in any conflicts situation. But, because of the type of representation provided by the inquirer's European office to the law firm that is the defendant in the malpractice action, even attributing all knowledge of attorneys in the inquirer's European office to the attorneys in the United States office, there seems to be no danger in the specific circumstances of this inquiry that any confidences or secrets were conveyed to that firm that would have any relevance or bearing whatsoever on the issues in the malpractice action. Moreover, as noted above, if disclosure of confidential information in violation of DR 4-101 were the only consideration involved, that rule is subject to the consent procedures provided by DR 4-101(C).

Likewise, we decline to find that DR 9-101, relating to avoiding the appearance of impropriety, precludes the inquirer's participation in the malpractice action. Although some courts have relied upon DR 9-101 in forbidding a firm to participate as counsel on both sides of the *same* matter,[2] we have been very hesitant to give disciplinary force to a standard as inherently vague as the "appearance of impropriety" (*e.g.*, Opinions 137, 157, 158). In any event, in our view the simultaneous representation in *different* matters involved here is not so likely to give rise to public criticism as to warrant prohibition on appearance grounds.

The two disciplinary rules which in our judgment have direct bearing on this situation are the interrelated provisions of DR 7-101, requiring that a law firm provide "zealous" representation to its clients, and DR 5-105(C), which provides that a lawyer must refuse to represent multiple clients unless "it is obvious that he can adequately represent the interest of each and . . . each consents to the representation after full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of each."

In our Opinion 49 we recognized that the "obvious" ability to provide "adequate representation," which pursuant to DR 7-101 must be "zealous," is an independent requirement which must be met even though consent is provided. Nevertheless, we also recognized that "adequate" representation is not an immutable ideal. Instead, "adequacy" of representation is related to the interests and objectives of the clients involved. For that reason, the clients' expressions of consent deserve considerable weight in determining whether the independent adequacy of

[1]Compare, for example, our Opinion 158 (relating to representation against a former client) with Opinion 131 (simultaneous representation of clients with conflicting interest).

[2]*E.g.*, Westinghouse v. Kerr-McGee, 580 F.2d 1311 (7th Cir. 1978); Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d cir. 1976).

representation requirements is satisfied. As stated in Opinion 49:

> Unless DR 5-105(C) was drafted to be a nullity, this must mean that "adequately represent" in the first part of DR 5-105(C) means something other than to represent with unimpaired professional judgment. What it has to mean is that the representation will be adequate to the purposes of the clients in the light of the understanding of the nature of the representation that is necessarily implied by each client's consent to the dual representation after the disclosure to each client of how the duality of the representation will affect the lawyer's performance.

Thus, the question with which we are confronted is whether on the facts of this inquiry we should conclude that representation adequate to the purposes of the respective clients cannot be provided so that the consent of all parties to the inquirer's continued participation in the malpractice action would be insufficient to permit it to continue.

The only instance in which this committee has refused to give effect to consent to simultaneous representation in circumstances not involving conflicting representation in the *same* matter was in our Opinion 131. In that situation, stripped to its essentials, a lawyer representing employees in an employment discrimination case against a federal agency was asked to represent another employee of the same agency in a peformance appraisal grievance case in which the second client sought to remove performance appraisals from the agency's file that were prepared by one of the inquirer's clients in the first case. In that situation we concluded that consent would *not* be sufficient to permit simultaneous representation of both clients because the two matters involved representation in litigation (as differentiated from counseling) and because of "the likelihood that disclosures of confidential information would be made" in one representation that might bear on the other. As stated in that opinion, "In the instant case there is a very real danger that the inquiring firm may make disclosures of confidences of the employee grievant in the course of representing the appraising official" in the employment discrimination case. Though the two proceedings were separate, since both matters related to employment at the same federal agency, there was a sufficient nexus of overlapping facts that we concluded that the inquiring lawyer could not adequately represent his clients within the meaning of DR 5-105(C) and DR 7-101 unless he inquired into matters that raised grave risks of thereby doing injury to one client or the other.

Although one of the two aspects of the instant inquiry involves litigation, as described above, the circumstances presented do not seem to involve any of the risks of misuse of confidential information on which our Opinion 131 turned. Of course, there is some theoretical risk that the inquirer might pull some punches in the malpractice case because of the small volume of unrelated work its European office performed for the defendant in the malpractice case, which, if that occurred, would violate DR 7-101. But, the inquirer has concluded that, in its judgment, it can provide zealous and effective representation to its client in the malpractice case, and that client apparently agrees with its counsel's conclusion. Thus, we conclude that this is a situation in which, upon obtaining the informed and uncoerced consent of all parties concerned, the inquiring law firm may continue to act as counsel for the plaintiff in a malpractice case brought against its own client because it appears "obvious" that it can "adequately represent" its client in that litigation.

Finally, we observe that DR 5-105(C) requires that consent be obtained prior to undertaking simultaneous representations and that such representations can only properly be undertaken if the requirements of that provision are met. DR 5-105(C) does not contemplate retroactive application of consent obtained after a representation has already been undertaken. We conclude that an exception is appropriate in this particular situation only (1) because the inquirer apparently had adopted reasonable procedures and had taken reasonable steps to check for the existence of conflicts and those efforts were ineffective only because the defendant in the malpractice action had changed its name and (2) because the inquiring firm acted promptly and responsibly as soon as the simultaneous representation became known. We caution, however, that we will construe such exceptions to the necessity of obtaining *prior* consent before undertaking representation of adversary clients very narrowly and that the possibility of retroactive consent should not be relied upon by any firm or lawyer in designing and implementing its procedures for ascertaining the possibility of client conflicts.

Inquiry No. 86-1-1
Adopted January 21, 1986

Opinion 164

Disqualification of a Law Firm Based on an Attorney's Past Private Employment

• A law firm is not disqualified from representing a client in a matter if one of its members was formerly a member of a firm representing an opposing party in circumstances in which the lawyer in question did not personally participate in the matter in his previous employment and the lawyer did not in fact come into possession of any confidences, secrets or other information potentially pertinent to the matter while in his prior employment.

Applicable Code Provisions

• **DR 4-101(B)** (A Lawyer Shall Not Knowingly Reveal a Confidence or Secret of his Client nor Use a Confidence or Secret of his Client to the Client's Disadvantage)

• **DR 9-101** (Avoiding Impropriety or the Appearance of Impropriety)

Inquiry

A partner of a firm that was engaged in one side of a matter intends to join another firm representing an adverse party in the same matter. The individual lawyer involved did not participate in the matter while at the previous firm, and it is not intended that he participate in the matter in his new employment. He came into possession of no confidences, secrets or other information potentially pertinent to the ongoing litigation while in his previous employment, and the current parties to the litigation have consented to his joining his new firm and state that they will not seek to disqualify his new firm on that basis. The inquiry is addressed to us, at the suggestion of the court in the pending proceeding, because the consent of the existing parties may not bind others who may subsequently become parties to the ongoing litigation.

Discussion

This inquiry raises a question relating to the application of the so-called "substantial relationship" test, inferred from DR 4-101(B), to successive employment with private firms. Although by its terms DR 4-101(B) relates only to the preservation of confidences and secrets of a client, in the absence of any disciplinary rule specifically relating to the subject, it has been used as a basis upon which courts have restricted side switching by lawyers where

a "substantial relationship" exists between the subject matter of a former representation and that of a subsequent adverse representation. *See Brown* v. *District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42-43 (App. D.C. 1984).[1]

On the facts of this case, as presented to us, the individual lawyer in question did not participate in any way in the relevant litigation while associated with his prior law firm and did not come into possession of any confidences, secrets or other information potentially pertinent to that proceeding. Therefore, it is clear that had he been a sole practitioner, there would be no basis for disqualifying him or his new firm from participating in the litigation in question.

The issue, thus, comes down to a question of whether the activity of former partners and associates will be attributed to a lawyer not personally involved in a matter who moves to a new firm.[2] In this regard, there is nothing in the language of DR 4-101(B) that provides a definitive answer to the question. Instead, we must look to applicable authority construing the substantial relationship test and to the purposes that test is designed to serve.

The primary purpose of the substantial relationship test is to prevent clients of attorneys from being disadvantaged by disclosure or misuse of information provided by them in confidence to their attorneys. It is recognized that a risk that such misuse will occur arises when a lawyer moves from a client's law firm to the firm of that client's opponent. Insofar as the dissemination of information is concerned, it is expected that members of a law firm will talk to each other about matters in which individual members are not directly involved, and that, indeed, the concept of a "firm" of lawyers presupposes that such communication will take place. At the same time, it is also recognized that lawyers do move from firm to firm, and that it would seriously impede the occupational choices open to many lawyers if attribution of knowledge among all firm members were to be strictly enforced at both ends of a move from one firm to another.

In the case of movements from the government to private employment, a codification of the substantial relationship test, DR 9-101(B), explicitly limits the disqualification of a former individual government lawyer and the presumptive disqualification of his successor firm to matters in which that lawyer "participated personally and substantially" in his former employment. Thus, prevention of disclosure and misuse of client confidences is balanced against not unduly restricting the occupational movement of attorneys by disqualifying the successor firm (even absent screening)[3] only if its new lawyer was personally and substantially involved in the matter in question during his earlier employment or actually came into possession of confidential information relating to the matter during the course of his or her prior employment. See our Opinion 111.

Although Rule 9-101(B) does not by its terms apply to successive private employment, in *Brown, supra*, 486 A.2d at 48, the court of appeals stated that the substantial relationship test inferred from DR 4-101(B), which is applied in prior private employment contexts, is essentially the same as that applied to former government lawyers under DR 9-101(B). In addition, the court in that opinion described its own understanding of how the substantial relationship test applies to a lawyer moving from one private firm to another as follows:

> When, . . . a law firm is involved in either of two substantially related matters, questions sometimes arise concerning the extent to which information has been shared among individual attorneys within the firm. For example, when a firm has provided representation in the first of two related matters, a court may have to determine whether an individual attorney who has since left the firm should be permitted, in effect, to switch sides by representing a party in the second matter adverse to his former firm's client in the first matter. In this situation, courts have established a rebuttable presumption that an attorney has received confidential information during the first matter. Thus, disqualification will be required unless the attorney clearly shows that, while at the firm, he or she did not work on the case and was not otherwise in a position to gain access to confidential information relating to the first matter.

Id. at 42-43 n.5. *Accord Gas-A-Tron of Arizona* v. *Union Oil Co. of Calif.*, 534 F.2d 1322, 1324 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975).

The resolution described by the court of appeals seems to us to be consistent with the language of DR 4-101 and the purposes of the substantial relationship test. According to the court of appeals' test, a rebuttable presumption exists that a lawyer has been privy to information relating to all matters in which his prior firm has been involved. But, where (1) he was not so directly involved in a particular matter while employed with the prior firm that exposure to information relating to that matter is irrebutably presumed (see *Brown, supra*, 486 A.2d at 49-50; Opinion 158) and (2) the lawyer is able to affirm unequivocally that he or she was not exposed to information potentially relevant or otherwise useful in the matter in question while associated with that firm, that presumption can be overcome.[4]

In reaching this conclusion, we caution that if a lawyer was personally and substantially involved in a matter during his prior employment, absent consent or consideration of other issues we do not reach in this opinion,[5] he and his subsequent firm are irrebutably disqualified from involvement in that matter. *See, e.g., Brown, supra*, 486 A.2d at 224; Opinion 158. A

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[1]The general admonition of Canon 9 that a lawyer should avoid even the appearance of impropriety is also conceivably applicable to the facts described, but we decline to find that a firm is barred from undertaking or continuing a representation on appearance grounds where the individual lawyer involved has not in the past and will not in the future be involved in the matter at issue.

[2]DR 9-102 creates screening procedures that protect private firms from disqualification based on the previous activities of a screened former government attorney who is personally disqualified from participating in representations undertaken by subsequent private employer. However, the screening provisions of DR 9-102 do not by their terms apply to lawyers who move from one private employer to another. We need not consider here whether the screening procedures provided with respect to ex-government lawyers would suffice, absent consent, to permit a firm employing a lawyer formerly employed by another private firm from participating in a matter in which that lawyer would be personally disqualified. On the facts of this inquiry we do not reach that issue because, in our opinion, the lawyer's subsequent employer is not barred from the representation because of his lack of contact with the matter at issue during his previous employment.

[3]See note 2, *supra*.

[4]Substantially the same test has been adopted by the American Bar Association in its Proposed Model Rules of Professional Conduct No. 1.10(b), and the substance of that proposal was endorsed in the Report of the District of Columbia Bar Model Rules of Professional Conduct Committee submitted to the Board of Governors of the D.C. Bar on September 10, 1985.

[5]*See* note 2, *supra*.

lawyer and his subsequent firm are also disqualified if the lawyer actually came into possession of knowledge pertinent to the matter while in his prior employment, no matter what his responsibility for or relationship to that matter may or may not have been. However, where a lawyer had no previous role in the matter and no actual knowledge relating to it, neither the lawyer nor his subsequent law firm are disqualified by operation of the substantial relationship test.[6]

Inquiry No. 86-1-3
Adopted January 21, 1986

Opinion No. 165

Joint Representation of a Tax Shelter Promoter and Investors in a Tax Proceeding During the Pendency of a Class Action on Behalf of the Investors Against the Promoter

• In providing joint representation to tax shelter promoters and investors in a tax proceeding a lawyer is required to bring information to the attention of all clients that might have a material impact on the desirability of each such client's election to make or accept a settlement proposal in the tax proceeding. In addition, if newly discovered information might have a material impact on the ability of the lawyer to provide adequate representation to each of the joint clients the lawyer must: (1) make a fresh evaluation of his ability to continue such joint representation in a manner adequate to the purpose of each of the joint clients; and (2) provide each client with all information necessary to enable it to make an informed judgment as to whether it wishes to consent to the continuation of the joint representation.

Applicable Code Provisions

• **DR 4-101** (Preservation of Confidences and Secrets of a Client)

• **DR 5-105** (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer)

• **DR 7-101(A)** (Representing a Client Zealously)

Inquiry

With the informed consent of the parties, the inquirer has undertaken the joint representation of promoters and investors in a tax shelter in proceedings before the Tax Court in which the tax benefits of the shelter are being challenged. During the pendency of the tax proceeding a separate class action was brought against the shelter promoters on behalf of a putative class consisting of the investors in the shelter, including clients of the inquirer. The named plaintiffs in the class action are not among the inquirer's clients in the tax proceeding, and the court has yet to make a determination that the named plaintiffs will be permitted to represent a class of investors which would include such clients. Indeed, it is the inquirer's belief that his investor/clients are not yet aware of the pendency of the class action.

The inquirer does not contemplate participating as counsel in the class action on behalf of either side. Nevertheless, the inquirer recognizes that the terms of a potential settlement of the tax proceeding in which he is acting as counsel, and which is now being negotiated with the Internal Revenue Service, might have some impact on the damages, if any, recoverable by investors in the class action if a class is established and a judgment is eventually entered against the promoters and in favor of the investor class in that action.

The inquirer asks whether the circumstances described create an actual conflict of interest between the tax shelter promoters and the investors which requires his withdrawal as counsel for either or both in the tax proceeding.

Discussion

In our recent Opinion 157 we concluded that in some circumstances a lawyer may provide joint representation to tax shelter promoters and investors in the course of tax proceedings when both are "united in their opposition to the [Internal Revenue] Service." We cautioned, however, that such representation can only be undertaken upon consent of all clients after full disclosure of all relevant considerations, including the fact that "there is a considerable risk in the circumstances of this case that if the joint clients should later find themselves in conflict the lawyer may be forced to withdraw from representing any of them." We also cautioned that, as provided in DR 5-105(C), the lawyer can only provide such joint representation so long as it is "obvious" that he can "adequately represent the interest of each" client.

In our view, the facts described present a situation in which it appears possible that the inquirer may have to withdraw from the settlement negotiation phase of the tax proceeding. At the very least, the inquirer must inform his clients, the investors, of the pendency of the class action and seek direction from them in light of the circumstances now presented.

We start from the fact that a lawyer has an obligation pursuant to DR 7-101(A), in providing zealous representation to his clients, to "not intentionally fail to seek the lawful objectives of his client through reasonably available means" and not to "prejudice or damage his client during the course of the professional relationship. . . ." In our view, zealous, unprejudicial representation in a particular proceeding includes making clients aware of information that might bear upon the desirability of their electing to make or accept a settlement proposal and which might affect the impact upon them of a settlement proposal in that proceeding. As discussed in our Opinion 103, the client has ultimate "control over the essential decisions in litigation," and " a lawyer should not take action which would irrevocably prejudice a client's position. . .without the client's consent." In turn, the necessity of obtaining consent to major litigation decisions requires that such consent be informed, which in this case means that the investor/clients must be made aware of the possible ramifications in the class action of the settlement terms proposed to be adopted in the tax proceeding.

In addition, we see the obligation of a lawyer providing joint representation pursuant to DR 5-105(C) to provide "full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each [client]" as something more than a one-shot requirement. Rather, in the event of a material change in circumstances potentially affecting the relationship between the lawyer and either of the joint clients, we believe that the fact and implications of that change of circumstances must be disclosed and explained to all clients and the informed consent of each renewed.

In this case, since the inquirer does not contemplate representing either side in the class action, it is not the fact that one set

[6]As indicated in note 1, *supra*, we need not reach in this opinion the issue of whether subsequent participation in the matter by the individual lawyer, as differentiated from his new firm, would create an appearance of impropriety violating Canon 9 because on the facts presented to us the individual lawyer will be screened from his new firm's involvement in the matter.

of previously consenting joint clients is suing the other that gives rise to an affirmative obligation of additional disclosure and possible disqualification. If the class action litigation between the two sets of previously consenting joint clients were totally unrelated to his ongoing representation of both, it might be possible for joint representation to continue without any further affirmative disclosure by the inquirer being required. The need for further affirmative disclosure by the inquirer arises in this case because the class action between the two sets of clients may potentially be affected, to the benefit of one set of clients, and to the detriment of the other, by settlement terms in the tax litigation which the inquirer is now negotiating on behalf of both.

In these circumstances we do not have such a detailed knowledge of the facts that we are able to conclude definitively that it is no longer "obvious" that the inquirer can adequately provide joint representation to both sets of clients in the tax litigation. However, the fact that the settlement terms of that litigation may have an impact on the outcome of the class action clearly raises that possibility and thus requires the inquirer to examine closely the circumstances represented and make a new determination of the "obvious adequacy" issue in light of the changed circumstances.

In addition, there can be no doubt that the pendency of the class action is a material fact which the inquirer is obligated, in providing zealous representation to his clients, and in obtaining their informed consent to a major decision in the litigation, to make known to them. It may be that after becoming aware of the pendency of the class action, and after the implications of the class action are explained to them, the investors and the promoters may prefer to retain separate counsel to engage in settlement negotiations while retaining the inquirer as joint counsel for litigation purposes. Some of the existing joint clients may decide that joint representation is no longer in their interests or choose some other course. Whatever they decide, however, such decisions must be based upon a full disclosure by their present lawyer of all facts and considerations material to that determination if the requirements of Rules 5-105 and 7-101 are to be met.

Finally, we caution again that even if informed consent is provided, the inquirer must still withdraw from the representation if it becomes less than "obvious" in the course of the tax litigation or the negotiation of its settlement that he can "adequately represent the interest of *each*" of his clients. (Emphasis added.)

Inquiry No. 85-9-36
Adopted January 21, 1986

Opinion No. 166

Right of Attorney to Bill Pro Bono Plaintiff for Costs Incurred During Representation

• Unless there is a contrary understanding, a lawyer may bill a plaintiff, who has recovered a large sum in an action in which the lawyer represented him on a *pro bono* basis, for the costs the lawyer incurred during the representation.

Applicable Code Provision

• **DR 5-103(B)** (Payment of Litigation Costs by Attorney)

Inquiry

Inquirer's firm has been ordered to represent a federal prisoner on a *pro bono* basis in a civil action against District of Columbia officials. In the suit plaintiff requests damages totalling $145,000; in inquirer's opinion, plaintiff likely will obtain money damages in some amount.

Inquirer asks whether his law firm will be able to bill plaintiff, should he win, for costs incurred by the firm in this *pro bono* action in the following circumstances:

1. A court has ordered the law firm to represent plaintiff in this action.
2. Plaintiff is an inmate in the federal prison system.
3. Plaintiff is housed in a prison facility more than 1,000 miles from the place of litigation.
4. Plaintiff alleges violations of his constitutional rights.
5. Plaintiff seeks a substantial amount of money as compensation for his damages.
6. The case may have a long life in litigation.

Discussion

The Code provision that is most applicable is DR 5-103(B) which reads:

> While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to his or her client, except that a lawyer may pay, advance or guarantee the expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence.

This version of this provision is somewhat different from that adopted by the American Bar Association, which states:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, *provided the client remains ultimately liable for such expenses.* (Emphasis added)

Unlike the ABA version, the District of Columbia provision allows a lawyer representing a *pro bono* client to become "ultimately liable" for the costs of the litigation. Apparently, the ABA version was altered in part because certain large District of Columbia firms wanted to be able to pay the costs of public interest *pro bono* litigation.

No opinion of this committee has dealt squarely with the issue whether a law firm may bill a *pro bono* client for the cost of litigation under the District of Columbia's version of DR 5-103(B), which was adopted on April 18, 1980. Opinion 104 (decided April 21, 1981) apparently interpreted the old version, which paralled that adopted by the ABA. There this committee concluded that, where an attorney is appointed to represent an indigent client, the attorney is obligated to advance the costs necessary for adequate representation. The committee made this ruling even though it recognized that, in some situations "as a practical matter, the lawyer will have to absorb those expenses whenever there is no mechanism for reimbursing him."

Opinion 104, however, seems to recognize that, where there is a "mechanism" for reimbursing expenses, the lawyer may seek reimbursement from a *pro bono* client. Indeed, the opinion said: "DR 5-103(B) of the present Code is explicit in providing that, if a lawyer advances the expenses of litigation, the client must nevertheless remain obligated for them." The current version does not support that conclusion, but nothing in it suggests that a lawyer may not bill a *pro bono* client for expenses.

Moreover, the District of Columbia Bar's Lawyer Referral and Information Service standard *pro bono* Retainer Agreement expressly obligates the client to pay

certain expenses. Paragraphs 4 and 5 of this Retainer Agreement state:

> 4. The Client agrees to pay the cost of any court filing fees, postage, copying, long-distance phone calls, depositions and expert witnesses fees.
>
> 5. If the Court should award costs to the Client, the Client will reim burse the Lawyer from the award for any out-of-pocket expenses incurred for which the Lawyer has not already been repaid by the Client.

In the present case, inquirer expects that his firm's *pro bono* client will receive a sizeable award, but only after a long litigation that will involve substantial expenses. There apparently is no agreement between the client and the firm that forecloses a request for payment of costs. In such circumstances, we see no ethical reason to restrict the firm from seeking such costs from the plaintiff and conclude that inquirer's firm may do so. However, to avoid any claim of misrepresentation, the firm should advise the client at the earliest opportunity that it will seek payment of costs if the suit is successful. *See* DR 1-102(A)(4).

Inquiry No. 85-11-43
Adopted February 18, 1986

Opinion No. 167

Advertising Overseas and Telephone Contacts With Potential Overseas Clients; Dividing Fees With Non-Lawyer Employees

• A member of the District of Columbia Bar may advertise his legal services outside of the United States and may receive telephone calls from potential clients outside of the United States. He may also compensate local "agents" in foreign countries who assist him in the course of representing clients located in such countries, though he may not "split fees" with such agents.

Applicable Code Provisions

• **DR 2-101(A) and (B)** (Publicity and Advertising)
• **DR 2-106** (Fees for Legal Services)
• **DR 2-107** (Division of Fees Among Lawyers)
• **DR 3-101(B)** (Aiding Unauthorized Practice of Law)
• **DR 3-102** (Dividing Legal Fees With a Non-Lawyer)

Inquiry

A member of the bars of California and the District of Columbia has a practice which includes immigration law. He wants to advertise his services in Hong Kong and London, where he has neither an office nor any paralegal or other agent. He believes there are potential clients in these areas, and he wants to communicate with them by telephone or by telex. He further wants to hire local agents in Hong Kong and London, who would act as "functional equivalents" of paralegals. The inquirer asks whether it would be proper if he compensates such local agents by splitting his attorney's fees with them.

Discussion

With respect to the question whether an attorney may advertise his legal services outside of the United States, and in a jurisdiction with which he otherwise has no connection, our Opinion 105 concludes that there are no geographical limitations arising from this jurisdiction's version of DR 2-101.[1] Given the omission of such limitations, the committee concluded in that opinion that a lawyer will not violate the Code of Professional Responsibility in effect in the District of Columbia simply by mailing letters of solicitation outside the District of Columbia or by placing advertisements in newspapers either in or outside the District of Columbia which reach readers in multiple jurisdictions. As noted in Opinion 105, EC 3-9 provides that the legal profession should discourage regulations that unreasonably impose territorial limitations upon the right of a lawyer to handle the legal affairs of his clients.[2]

Opinion 105 is subject to the caveat that DR 3-101(B) requires that "a lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." We assume that the inquirer has no intention of practicing law in London or Hong Kong but merely intends that persons located there with potential immigration problems concerning entry into the United States will contact him. The inquirer should note, however, that while Opinion 105 opines that advertising alone does not constitute the practice of law for purposes of application of our disciplinary rules, it is possible that the inquirer's activities in England and Hong Kong could subject him to the jurisdiction of those locales and that those jurisdictions might reach a different conclusion as to that issue.

With respect to the inquirer's proposal to appoint agents in London and Hong Kong, there is no provision of our disciplinary rules that forbids a lawyer to employ an agent in a foreign jurisdiction. Thus, assuming that the agents do not constitute the unauthorized practice of law according to the jurisdiction in question, the appointment of such agents does not violate our disciplinary rules. Likewise, there is nothing in the Code of Professional Responsibility that prohibits use of a telephone or answering service in London or Hong Kong.

It is clear, however, that the inquirer may not "split" his attorneys' fees with a local agent. DR 3-102 and EC 3-8 explicitly forbid a lawyer to "split" or "share" legal fees with non-lawyers, and DR 2-107 only permits the splitting of fees with other lawyers under specified circumstances. Thus, whether the agents are lawyers or not, it would violate the disciplinary rules for a lawyer to "split" or "share" his fees with them.

On the other hand, it is also clear that a lawyer may pay his agents who provide services in connection with a lawyer's representation of his clients and include such payments in the lawyer's bill to the clients for whom the work was performed. For example, in its Opinion 80-27, although the Bar Association of the City of New York concluded that it was not ethically proper for an attorney to pay a "forwarding fee" to a lawyer from a foreign country who referred a matter to the inquirer's office, where the foreign

[1]Unlike the text of the District of Columbia's DR 2-101, the ABA version of DR 2-101(B) contains geographical limitations on publicity. DR 2-101(B) states:

> In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed over telephone or radio broadcasts in the geographic area or areas where the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides...

[2]As provided in DR 2-101(A) and (B), a lawyer must not make any representations about his or her ability, background or experience or about the fee or any other aspect of his professional engagement that is false, fraudulent, misleading and that might reasonably be expected to induce reliance by a member of the public. This rule applies to members of the District of Columbia Bar wherever their representations or advertisements may be received.

lawyer performed investigative work in connection with such matters, the same opinion concluded that it was permissible for the U.S. lawyer to compensate the foreign lawyer for the work performed. In particular, the opinion observed that it would be proper for the foreign lawyer to be compensated for investigative functions that do *not* entail the practice of law and for tasks for which licensure would not be required. The opinion also cautions the inquirer that the amount of such payments must approximate the amount that would be paid to an independent investigator for such work and that any stipend substantially in excess of that amount might constitute a disguised division of fees with a layman, in violation of DR's 2-107 or 3-102.

We agree with the reasoning and outcome of the New York City Bar opinion. Whether the agent in a foreign country is a lawyer or not, the disciplinary rules forbid a U.S. lawyer from "sharing" or "splitting" fees on a percentage or other arbitrary basis unrelated to the work performed by the foreign agent. On the other hand, nothing in the code forbids a lawyer from paying an agent or other lay person for services rendered in connection with a matter and billing the client for such services so long as the standards of reasonableness applicable to lawyers' fees are met. See DR 2-106 and our Opinion 109.

Inquiry No. 84-2-5
Adopted March 18, 1986

Opinion No. 168

Obligation of Former Lawyer to Provide Client Materials to Current Lawyer

• If requested by his former client, a lawyer must provide to his former client's current lawyer all materials generated during the course of the previous representation necessary to avoid foreseeable prejudice to the client in the ongoing representation of the client's interests.

Applicable Code Provisions

• **DR 2-110(A)(2)** (Withdrawal from Employment)

Inquiry

Inquirer is a former associate who left Firm A to start his own practice. Several former clients of Firm A have now hired inquirer, and have requested that Firm A turn over all files concerning those clients to inquirer. All fees of Firm A have been paid, and thus there is no issue of lawyer's liens. Firm A has turned over some files, but has refused to turn over correspondence files on the ground that such files are the property of Firm A, not the client. These files contain, according to Firm A, "the firm's record of its dealings with the client and have nothing to do with 'materials' or 'property' delivered to this firm by the client." According to the inquirer, the files contain "all papers which have not been filed with an agency or court, . . . [including] correspondence to and from clients and third parties, telephone memorandum, research memorandum, and other documents which substitute counsel could not otherwise easily reproduce."

Firm A has offered to review and duplicate the file, but only at inquirer's expense. Inquirer argues that Firm A has an ethical obligation to deliver to the client, without charge and upon request, all materials for the preparation of which the client was billed, including any "work product" not previously made a public document or sent to the client.

Discussion

While this inquiry comes to us as a dispute between lawyers, the focus of our inquiry, as it should always be, is on the duty owed by these respective lawyers to their present and former clients. In essence, the inquirer argues that the client is entitled to anything produced by the law firm for which the client was charged; the firm argues that certain material is its property and that it has no duty to deliver that material to its former client or its new lawyer. We believe both characterizations miss the point.

A lawyer's primary responsibility is to his client. Any rights or obligations that the lawyer may have to act inconsistently with his client's interests are carefully delineated in the Code. For example, a lawyer must represent his client zealously, but he may not engage in conduct involving "dishonesty, fraud, deceit or misrepresentation." DR 1-102(A)(4). He may reveal secrets or confidences of a client only in very limited circumstances, DR 4-101(C), and he may not undertake to represent conflicting interests without the permission of all relevant clients. *See* DR 5-105. He cannot prejudice or damage his client, DR 7-101, except in very specific and limited circumstances. *See* DR 7-102. Finally, and most relevant here, a lawyer has certain obligations to meet before he may withdraw from a representation, whether voluntarily or at the client's request. DR 2-110(A)(2).[1]

The issue raised by this inquiry has arisen on numerous occasions in various jurisdictions. Whatever the conclusion in the particular case, it has most frequently been based upon property notions: who owns (or otherwise has a property interest in) the materials in question. The language of DR 2-110(A)(2) and its counterparts in other jurisdictions is at least partially responsible for this focus, since it speaks of delivering "all paper and property to which the client is entitled[.]" "Entitled" is an ambiguous word, and it unfortunately lends itself to thinking in terms of property. As noted above, however, the real issue is the lawyer's responsibility to his former client. While there may be some debate (and indeed some legal uncertainty) over property rights in various materials, the property concept does not necessarily determine the ethical responsibilities or obligations of a lawyer. A lawyer must obviously return to his former client upon demand any property of that client. The more complex question involves the client's right to material that may not be, in a traditional legal sense, the client's "property."

DR 2-110(A)(2) requires that, before withdrawal, a lawyer must take "reasonable steps to avoid foreseeable prejudice to the rights of his client[.]" Similarly, EC 2-32 provides that prior to discontinuing representation of client, a lawyer should, *inter alia*, "cooperat[e] with counsel subsequently employed, and otherwise endeavo[r] to minimize the possibility of harm [to the client]." The language of DR 2-110(A)(2) and EC 2-32 makes clear the ethical responsibility to the client where the client exercises his right to choose substitute counsel. A client should not be prejudiced by his decision to seek new counsel, and an attorney must facilitate the client's transition to a substitute attorney at least to the extent that such assistance is necessary to avoid "foreseeable prejudice."

While it may be impossible to predict with certainty that any particular refusal to deliver any specific document will in fact result in prejudice to the client, a lawyer's obligation to his client requires that he err if at all on the side of serving the client's interests. Therefore, we believe that, in ad-

[1]This Committee has already held that the same obligation exists whether a lawyer withdraws or a client exercises his right to choose new counsel and thus causes the lawyer to involuntarily withdraw. Opinion No. 59.

dition to any property of the client, DR 2-110(A)(2) requires an attorney to deliver, upon request, the entire contents of the client's file, including but not limited to all notes, memoranda and correspondence constituting "work product", to his former client or substitute counsel, unless the attorney can reasonably conclude that the failure to deliver requested materials will not prejudice his former client's interests.[2]

Several other jurisdictions have arrived at a similar result, although not always based on the same reasoning. The Michigan Bar Ethics Committee has consistently concluded that an attorney has an ethical duty to deliver to the former client or substitute counsel, upon request, the client's file, including all notes, memoranda and correspondence.[3] In addition, the Michigan Committee has found that "substitute counsel is entitled to the benefit of the lawyer's 'work product' for which the client has paid a fee[.]" Informal Opinion CI-743.

The California Court of Appeals for the Second District has held that it is a breach of the duty imposed by Rule 2-111(A)(2) of the California Rules of Professional Conduct[4] to retain a client's file after termination of the attorney-client relationship, because the work product of the attorney belongs absolutely to the client, regardless of whether the attorney has been paid for his services.[5] Similarly, the Supreme Court of California has held that it is a breach of an attorney's ethical duty to withhold a former client's file from a substitute attorney.[6]

While the Michigan and California opinions both support the determination that an attorney must deliver to a former client or substitute counsel a broad category of items making up the client file, these opinions largely rest upon the conclusion that such materials are the property of the client. Whatever the conclusion may be on the property issue, however, the ethical issue is not inevitably decided. The proper focus of an inquiry into an attorney's duty to deliver the file to a former client should be the "reasonable" possibility of "foreseeable" prejudice to that client in the event that the file is withheld, regardless of how the "property" issue is decided. An attorney must determine what must be released to a former client with that standard in mind, and should not rely upon the fact that the client has been charged (or not) for a particular piece of work or on whether the document in question constitutes "work product", in the general meaning of that term. Because the client should be the attorney's foremost concern, DR 2-110(A)(2) requires that all requested materials be produced that are likely to be useful to the client or to substitute counsel's representation of that client's interests.[7]

This conclusion does not mean that every document in the possession of the lawyer must be delivered to a former client on request. For example, the Michigan Bar Ethics Committee found that a lawyer's personal observation notes or memos with respect to the client's character or competency traits need not be released to substitute counsel, particularly if negative.[8] Likewise, where the failure to deliver certain materials (such as time records, material containing personal observations, or earlier drafts of materials that have been delivered) is not likely to prejudice the interests of the former client, the lawyer is not required to produce those materials, even if they are requested by the client or substitute counsel.

Of course, the former lawyer may wish to retain copies of certain materials, either for administrative purposes or conceivably to defend the lawyer in the event of a possible malpractice action. If so, absent some agreement to the contrary with his former client, the creation and cost of such copies are the responsibility of the former lawyer and he continues to have the same obligation of protecting client confidences and secrets that he had during the course of the relationship. In addition, the former lawyer is not required to produce material that was not generated in the course of the representation (but nonetheless is in the lawyer's possession) or materials the withholding of which would not be likely to cause prejudice to the former client (*e.g.*, time records or other administrative materials).

But these exceptions should be viewed as just that: exceptions. As DR 2-110(A)(2) proscribes, a lawyer may not withdraw from employment without taking "reasonable steps to avoid foreseeable prejudice to the rights of his clients. . . ." Considered in context with the primacy of client interests and the professional obligations of lawyers to serve those interests, this language requires that a former client's request for materials generated in the course of his representation must be complied with completely and promptly, with materials withheld only where it can reasonably be concluded that such withholding will not result in foreseeable prejudice to the former client.

Inquiry No. 84-12-36
Adopted April 15, 1986

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[2]Cf. The Uniform Health-Care Information Act (based on its findings that medical patients need access to their medical records as a matter of fairness and to enable them to make informed decisions, the National Conference of Commissioners on Uniform State Laws has recently approved draft legislation requiring that patients or third parties designated by them be granted access to their medical records upon request). See also D.C. Ethics Opinion 14, which holds that a former lawyer should turn over to his former client "that portion of his work product which is necessary to the adequate representation of the client."

[3]See, e.g., Michigan Opinions CI-716, CI-722, CI-743, and CI-766.

[4]The language of Rule 2-111(A)(2) is identical to that of DR 2-110(A)(2) of the Code of Professional Responsibility.

[5]*Weiss v. Marcus*, 51 Cal.App.3d 590, 599, 124 Cal.Rptr. 297, 304 (1975) (endorsing Opinion No. 330 of the Committee on Legal Ethics of the Los Angeles County Bar Association). In the District of Columbia, the existence of a fee dispute may permit a lawyer to retain materials that otherwise should be delivered to the client upon request. Opinion No. 59.

[6]*Finch v. State Bar of California*, 28 Cal.3d 659, 621 P.2d 253, 170 Cal.Rptr. 629 (1981).

[7]The American Bar Association Committee on Ethics and Professional Responsibility has most recently dealt with this question in Informal Opinion 1376. That opinion concluded that the attorney must return to the client all materials supplied by the client, and all "end-products" and other materials paid for by the client which may be useful to the client. The opinion specifically excluded from this category "internal notes and memos which have been generated primarily for [the attorney's] own purposes in working on the client's problem." The ethical principle on which the Committee relied is that "[t]he client is entitled to receive what he has paid for and to the return of what he has delivered to the lawyer." However, the Committee went on to say (although presumably not interpreting the Code) that "the conscientious lawyer should not withhold from the client *any* item which it could reasonably be anticipated would be useful to the client." (Emphasis added).

In delineating exceptions to what must be released based on a "stage of production" standard and creating a catch-all category of what should be released based on a standard of "potential usefulness" to a client, Informal Opinion 1376 is internally inconsistent. Nor do we see any reason to presume that internal notes and memos will not have any use to the former client or substitute counsel in representing his interests. Information Opinion 1376, in attempting to be all things to all people, is sufficiently confusing that it is not very helpful.

[8]*See* Opinion CI-743.

Opinion No. 169

Obligations of Lawyer-Employee During Pendency of Employment Dispute

• A lawyer-employee engaged in an employment dispute with his employer may ethically represent that employer during the pendency of his employment dispute only if he can reasonably conclude that he will nonetheless be able to fulfill his responsibilities to the client.

Applicable Code Provisions

• **DR 4-101** (Preservation of Confidences and Secrets of a Client)

• **DR 5-101(A)&(B)** (Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment)

• **DR 5-102** (Withdrawal as Counsel When the Lawyer Becomes a Witness)

• **DR 6-101** (Failure to Act Competently)

• **DR 7-101 & 7-101(A)(3)** (Zealous Representation)

Inquiry

Inquirer asks whether an attorney employed by an institution may ethically represent that institution while simultaneously filing personal claims (including lawsuits, administrative claims and workmen's compensation claims) against the institution. In addition, inquirer asks whether there are any ethical limitations on the actions that might be taken by the institution against such an attorney.

Discussion

This inquiry presents a difficult case of interpretation of the literal language of the Code. An attorney employed by an institution owes various ethical obligations to that institution, his client. For example DR 4-101 requires a lawyer to preserve the confidences and secrets of his client, and never to use such confidences or secrets to the client's disadvantage, or (without the client's consent) for the lawyer's personal advantage. DR 5-101(A) requires the lawyer to refuse employment "if the exercise of his professional judgment on behalf of his client will *or reasonably may be* affected by his own financial, business, property, or personal interests."

DR 5-101(B) and 5-102 generally require a lawyer to decline or withdraw from employment if he becomes a witness in that proceeding. DR 5-105 prohibits a lawyer from accepting or continuing employment if the interests of another client might impair his independent professional judgment, absent the consent of all clients.

DR 6-101 requires a lawyer to act competently, and DR 7-101 requires him to represent his client zealously. DR 7-101(A)(3) specifically enjoins a lawyer from causing "prejudice or damage [to] his client during the course of the professional relationship."

Without more facts, it cannot be clearly determined whether one of the Code provisions cited above would in fact be violated by the conduct that is the subject of this inquiry. DR 4-101, 6-101, and 7-101 all enjoin particular conduct, and a determination that those provisions have been violated would require a review of the specific conduct of the lawyer-employee during the course of his representing the institution. A violation of DR 5-101(B) and 5-102 would arise only if the employee was asked to represent the institution in a proceeding involving his grievance in which he was (or was likely to be) a witness—an unlikely event. DR 5-105 would be violated only if the lawyer chose to appear *pro se* in his grievance proceeding, since that provision requires that the interests of another client (in that case, himself) be the cause of the impairment of professional judgment that is enjoined; this problem could be cured by an informed waiver by both clients, unless the representation was otherwise forbidden by the Code.

DR 5-101(A) and DR 7-101(A)(3) are more ambiguous but probably most relevant here. DR 5-101(A) states that a lawyer must decline employment if his representation of a client "will or reasonably may be" affected by his personal interests. It is certainly possible that the instant situation could create a circumstance where continued representation of the institutional client would violate DR 5-101(A). Thus, the lawyer involved in such a situation must carefully consider whether his personal dispute with the institution will impair his ability to appropriately represent his client. If the client expresses concern about this point, such an expression should be carefully considered in reaching a determination as to whether the lawyer can appropriately continue his representation. *See* Opinion 112; 144.

This is a different and arguably more serious conflict than that of two clients, for here the lawyer has a personal interest and, in some situations, perhaps a personal antagonism arising out of his personal dispute. We have recently held, in Opinion 144, that where personal activities "may affect [a lawyer's] judgment" as an attorney, he may not continue in that representation. While the instant situation would not inevitably result in violation of DR 5-101(A), in some situations the only prudent course to protect the client's interests would be to cease representation of the employer, at least during the course of an attorney-employee's dispute with that employer.

DR 7-101(A)(3) also could be relevant. In Opinion 118, we held that lawyers for an institution that were also members of an employee union could participate in a job action "only if that participation in no way interferes with the timely and competent performance of the work." Here, it is certainly possible that the employment dispute could create such a working atmosphere that it would be difficult or impossible to avoid a violation of DR 7-101(A)(3). Thus, the attorney-employee must carefully consider how his dispute affects—if at all—his duties as a lawyer and his obligations under DR 7-101(A)(3).

It is certainly possible that an individual lawyer-employee could so compartmentalize his intellectual and emotional reactions to his dispute with his employer that he could continue to provide professionally acceptable service on unrelated matters. But it is also possible that the lawyer-employee will not be able to represent his client (who is simultaneously his adversary) zealously; will not be able to avoid having his personal interests affect his ability to represent his client-employer with whom he has a dispute; or will be sorely tempted to use confidences or secrets of his client to his personal advantage. Even if he manages to avoid these pitfalls, his client is likely to wonder whether he is placing his personal interests and grievances above the client's interests. Under these circumstances, the lawyer must carefully consider his ethical obligations, and should continue in the representation only if he can reasonably conclude that he nonetheless will be able to fulfill his responsibilities to the client.

Obviously, this conclusion has the potential for creating a serious burden on lawyer-employees with real grievances against their employer. Depending upon the employer's willingness to cooperate in resolving the grievance quickly, this conclusion could in some circumstances require the lawyer-employee to take a leave of absence or even to resign in order to prosecute his grievance. But this burden is inherent in the professional obligations assumed by every attorney. If a private attorney and his client engage in a serious dispute, the private attorney might well be disabled from carrying on further work for

that client until the dispute is resolved. Similarly, if a lawyer's other client relationships are such that they threaten the exercise of his independent professional judgment for a specific client, he may not represent that client, even if there is no direct conflict of interest in that particular proceeding.

While the practical effect of the application of this principle may on occasion be more severe for the lawyer-employee than the private practitioner, the principle is identical. The lawyer chose to rely upon a single client by accepting employment; he cannot now be heard to ask for relief from his ethical obligations merely because that choice has made compliance with those obligations especially painful.

This opinion is limited to the specific facts of this inquiry, and does not purport to establish any rule of general applicability to the myriad of direct and indirect relationships that may exist between a lawyer and a specific client or its affiliates.

With respect to the second part of the inquiry, the ethical rules obviously apply only to members of the bar, and not to institutions. Assuming the institution acts through a member of the bar, that individual obviously must comply with the Code as interpreted.

Inquiry No. 84-12-37
Adopted April 15, 1986

Opinion No. 170

National Telephone Lawyer Referral Service

• A prepaid legal services plan which provides extremely limited legal services and which is to be "marketed" through unspecified representations is not inherently unethical but must be carefully structured to avoid violation of the Code provisions noted below.

Applicable Code Provisions

• **DR 2-101** (Misleading Advertising Prohibited)
• **DR 2-103** (Solicitation of Professional Employment)
• **DR 2-106** (Excessive Fees Prohibited)
• **DR 4-101** (Preservation of Client's Confidences)
• **DR 5-101** (Refusing Employment When Independent Professional Judgment May be Impaired)
• **DR 5-105** (Avoiding Conflicts of Interest)
• **DR 5-107** (Avoiding Influence by Others Than the Client)
• **DR 6-101** (Duty to Act Competently)
• **DR 7-101** (Duty to Act Zealously)

Inquiry

The inquirer, a member of the District of Columbia Bar, has been asked by a national profit-making corporation to participate in its prepaid legal services plan. Under the arrangement, one "access firm" will be selected in each state. The corporation through unspecified marketing devices, presumably including advertising, will seek subscribers among employee benefit programs and from the general public.

The subscribers will pay a monthly fee. The fee will entitle the subscriber to "unlimited telephone access to legal advice on matters within the scope of the Plan, provided the matters do not require significant work or representation in litigation." It will cover the "access firm's" "writing one or two letters on the members' behalf on a particular matter, and reviewing relatively simple documents which are mailed in by members." In some instances, for higher subscription charges, additional services such as preparation of a simple will may be provided.

If a subscriber requires legal services not covered by the Plan, such as representation in litigation, the subscriber will be referred not to the "access firm" but to a list of several recommended attorneys, who have agreed to represent subscribers at a reduced fee and among whom the subscriber may choose if desired. The "access firm" itself is not allowed to accept business through such referrals.

Discussion

Lawyer referral services are treated by the Code of Professional Responsibility as a beneficial method of encouraging an informed selection of an attorney.[1] The District of Columbia Court of Appeals in DR 2-103 has taken an even more permissive view than the American Bar Association Code of Professional Responsibility in encouraging both legal referral services and plans for prepaid legal services. As adopted in the District of Columbia, DR 2-103 provides in relevant part:

DR 2-103 Solicitation of Professional Employment

(A) A lawyer shall not seek by in-person contact, or through an intermediary, his or her employment (or employment of a partner or associate) by a non-lawyer who has not sought his or her advice regarding employment of a lawyer, if:
(1) The solicitation involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B); or
(2) The solicitation involves the use of undue influence; or
(3) The potential client is apparently in a physical or mental condition which would make it unlikely that he or she could exercise reasonable, considered judgment as to the selection of a lawyer.

(B) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of his or her services or those of his or her partner, or associate or any other lawyer affiliated with him or her or his or her firm, as a private practitioner, if:
(1) The promotional activity involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C); or
(2) The promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.

(C) A lawyer shall not compensate or give anything to a person or organization to recommend or secure his or her employment by a client, or as a reward for having made a recommendation resulting in his or her employment by a client, except that he or she may pay for public communications permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service.

In Opinion 155, issued last year, this Committee approved a prepaid legal services plan for members of a non-profit organization, while cautioning that the plan should be carefully administered so as not to run afoul of several provisions of the

[1] Thus EC 2-15 states:
The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

Code of Professional Responsibility. In Opinion 91, issued in 1980, this Committee considered a proposal for a prepaid legal services plan to be marketed by direct-mail advertising. The Committee there concluded that although such advertisting was not prohibited, it must conform to the limitations of DR 2-101, and the materials proposed in that case were found wanting.

In the present inquiry, none of the materials to be used has been furnished or described to the Committee. We are simply informed that "This prepaid legal services plan is being marketed by a major national corporation." Without knowing in what terms that marketing is to be conducted, the Committee cannot be assured that DR 2-101 has been or will be complied with. Under DR 2-104(B), the attorney is responsible for the marketing methods of the corporation. *See also* DR 1-102(A)(3) and (4).

Other aspects of the proposal require close attention as well. The subscriber is to pay a monthly fee that entitles him or her to "unlimited telephone access to legal advice," "reviewing relatively simple documents," and "one or two letters," but that specifically exempts matters that "require significant work" or litigation. The exact scope of the services the client is buying for the subscription fee is not clear from the terms described. If the service provided is essentially an "off-the-cuff" telephone opinion with no significant legal research or expertise to back it up, the client may have been provided little that he or she can rely upon. It is even possible that if inquiries are handled in a too rapid and assembly-line fashion, the attorney's duty to provide competent and zealous representation for the client unaffected by the attorney's own financial interests may become implicated. *See* DR 5-101; DR 6-101; DR 7-101. The attorney would have to observe carefully his obligation to inform the client when the question was, as many legal questions are, a complex one calling for more than a short and simple response.

In addition to the question whether the prospective subscriber would be adequately warned, pursuant to DR 2-101, of the very limited legal services he or she was purchasing, it is necessary to consider whether, depending upon the charges, the fee to the client might not be excessive. It may well be that here, as this Committee observed in Opinion 91, "it is likely that any participant who had need of legal services would incur far greater costs when one considers the many limitations and exceptions that are part of the actual plan." A fee that is unreasonably out of proportion to the services actually provided is excessive and forbidden by DR 2-106. Also, although the Code no longer limits approval of prepaid legal service plans to those that are operated by not-for-profit entities, the fact that the subscriber pays the corporation rather than the attorney, and that the profit-making corporation keeps a portion of the fee, could contribute to making the fee excessive. *See* DR 2-103(C).

The plan must also be structured in a way that will ensure preservation of the client's confidences. *See* DR 4-101. The corporation must not in any way seek to direct the attorney's actions on behalf of his client. *See* DR 5-107. And the system must be structured in such a way to be sure that sufficient information is elicited and maintained so that conflicts of interest in the representation do not arise—as, for example, in inadvertently representing both buyer and seller in the same transaction. *See* DR 5-105.

In summary, the Committee concludes that although there is nothing inherently unethical in the concept that has been described to us in general terms, the execution of it must be conducted with unusual care in order to avoid violations of the Code provisions noted above.

Inquiry No. 85-4-16
Adopted April 15, 1986

Opinion No. 171

Testimony Against Former Client in Malpractice Action Versus Co-Counsel

• To the extent necessary to the defense of a malpractice action brought by a former client against an attorney's co-counsel, the attorney may provide testimony revealing confidences or secrets of the former client. The attorney may also give opinion testimony adverse to the former client.

Applicable Code Provisions

• **DR 4-101** (Preservation of Confidences and Secrets of a Client)
• **DR 9-101** (Avoiding Impropriety or the Appearance of Impropriety)

Inquiry

The inquiry relates to a client who asked his lawyer to file a malpractice claim against a doctor. The lawyer advised his client that he would not bring a medical malpractice suit on his behalf unless a medical opinion could be obtained supporting the claim. Subsequently the attorney was able to obtain such an opinion and filed a complaint on the client's behalf against the doctor. However, by the time the complaint was filed the statute of limitations had run.

The client's original attorney then retained the inquirer to act as principal trial counsel in the medical malpractice case. It was hoped that the effect of the statute of limitations could be avoided on the theory that the client had not been aware that he had good ground to bring the medical malpractice claim until the supporting medical opinion was obtained. However, during a deposition at which he was represented by the inquirer, the client testified that he had always believed that he had a valid malpractice claim and, subsequently, a motion for summary judgment dismissing the complaint on statute of limitations grounds was granted.

The client has now retained a third lawyer and has sued his original attorney for legal malpractice. The original attorney has asked the inquirer to testify as a witness on his behalf. It is contemplated that the inquirer will testify that given the facts and circumstances known to the client's original attorney his conduct did not constitute malpractice.

The inquirer asks whether it would violate any ethical rule for him to appear and give both fact and opinion testimony on behalf of the client's original attorney in the malpractice action.

Discussion

The question presented has two aspects: (1) the extent to which the inquirer may testify as to factual circumstances relating to the original attorney's representation of their client and (2) the extent to which the inquirer may give opinion testimony on the application of legal standards to those facts.

Factual Testimony—Ordinarily a lawyer is forbidden by DR 4-101 from revealing the confidences or secrets of a client. This prohibition applies to the provision of testimony as it does to any other manner of disclosure. However, DR 4-101(C)(4) states by way of exception that "A lawyer may reveal ... confidences or secrets necessary ... to defend himself or his employees *or associates* against an accusation of wrongful conduct." (Emphasis added.) In effect, DR 4-101(C)(4) provides that, by implication, a client is taken to have waived the confidentiality ordinarily applying to at least some communications with a lawyer when he charges that lawyer with malpractice.

Assuming that any factual testimony to be given by the inquirer is likely to relate to confidences or secrets provided by the client either to the original lawyer or to the inquirer, the crucial question then becomes what meaning should be given the word "associates" as used in the proviso. Consistent with ordinary usage the word might be given a narrow reading as relating only to associate lawyers in the malpractice defendant's firm. Alternatively, it would also be consistent with ordinary usage to give the term a broader meaning encompassing members of other firms associated with the defendant in representing a client in a particular matter.

In deciding which meaning the word "associates" should be given in the context of DR 4-101(C)(4), we look to the practical effects the alternative readings would have. In that light, in our view it would place single practitioners in an unreasonably unfavorable position to construe this proviso to require that lawyers be in the same firm before facts "necessary" to the defense of a malpractice claim may be revealed to a finder of fact by their co-counsel. By bringing the malpractice action the client has already waived the confidentiality of such "necessary" information in the possession of the accused lawyer himself. We conclude that fairness requires that such waiver also apply to others associated with the accused attorney in the same representation, whether members of the same firm or not.

We also believe that our conclusion is consistent with the interests of justice, as well as consistent with the language of the applicable rule. Indeed, we note that giving the word "associate" a narrow reading would lead to the anomalous result that an "associate" of a lawyer could testify in his defense, but not his "partner." More important, however, it is obvious that co-counsel "associated" with a lawyer may be the only individuals other than the parties to the malpractice action able to provide information relevant to the issues involved in the case, and it would be an artificial impediment to presentation of relevant evidence to the trier of fact to bar co-counsel employed by a different law firm from providing testimony he would be able to give if he were employed at the same firm as the defendant. We emphasize, however, that in any circumstances this exception to the confidentiality otherwise due attorney-client communications is limited to those facts "necessary" to the defense of the malpractice claim.

Legal Opinions—The inquiring lawyer is not likely to be unique in his ability to provide opinion testimony regarding the ultimate legal issues involved in the case. Also, in giving opinion testimony on behalf of an adversary of his former client, that testimony will go beyond describing objective facts to rendering legal opinions in opposition to the former client. Thus, in our view the prospect of providing opinion testimony against a former client raises different concerns from those involved in testimony confined to the facts.

In giving opinion testimony adverse to a former client, the primary concern relates to the degree of loyalty a lawyer owes to his clients. As we observed in our Opinion 78, relating to a new government lawyer participating in enforcement activities against former private clients, "there is a strong sense in the profession, which as a general matter and in the absence of a threat of revelation or misuse of client confidences we find hard to tie to any specific provision of the Code, of "misgivings respecting the wisdom of attorneys accepting representations when former clients are involved." [quoting *Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*, 518 F.2d 751, 760 (2d Cir. 1975) (Adams, J. concurring)]. In our Opinion 63 involving a lawyer proposing to cross-examine a former client we dealt with much the same concern. The same "misgivings" apply to the present case.

Nevertheless, having concluded that the inquirer is permitted by DR 4-101(C)(4) to provide factual testimony necessary to the defense of his former co-counsel, we find no provision of the disciplinary rules that forbids the inquirer to state such conclusions as he derives from those facts, even though those conclusions may be adverse to his former client. In Opinion 63, despite our misgivings, we concluded that a lawyer may engage in adverse cross-examination of a former client if no client confidences or secrets would be revealed or relied upon. Likewise, in Opinion 78, given similar assumptions, we concluded that a new government lawyer may bring enforcement proceedings against a former client without violating ethical prohibitions. As we stated in Opinion 78, "the former . . . client should no longer expect any loyalty. . . ."

Presuming that DR 4-101(C)(4) permits the inquirer to reveal client confidences or secrets necessary to the defense of his co-counsel, the only provision of the Code which might provide a basis for prohibiting him from giving opinions adverse to his former client is the general admonition in DR 9-101 that a lawyer must avoid the appearance of impropriety. Although we have on occasion given enforceable meaning to DR 9-101 (see Opinion 137 involving attorney spouses), we have been reluctant to do so because of the inherent vagueness and subjectivity of the prohibition stated in the rule. We are willing to enforce DR 9-101 only when conduct of attorneys would clearly violate public expectations as, for example, when a law firm or lawyer spouses would represent both sides of the same case.

In this case, the attorney-client relationship between the inquirer and his former client is at an end and, for that reason, we find the present circumstances indistinguishable in principle from those involved in Opinions 63 and 78. In particular, when a former client seeks damages for alleged malpractice from one of two lawyers who represented him in a prior proceeding, and he has retained entirely new counsel to represent him in the attorney malpractice action, it should not violate the former client's expectations or that of the public that the defendant lawyer's co-counsel should give opinion testimony in defense of his former associate in that representation. We, of course, advance no view as to the admissibility or probative force of the testimony proposed to be given, but in our view the inquirer will not violate the disciplinary rules by giving it.

Inquiry No. 86-3-13
Adopted April 15, 1986

Opinion No. 172

Advertising a Joint Enterprise Between Lawyers and Non-Lawyers

- Assuming that participation by a law firm in a joint venture with non-lawyers is undertaken in a manner that does not in itself run afoul of the Disciplinary Rules, a law firm may appear in the joint venture's advertisements, provided the law firm identifies itself as such.
- If the joint venture intends to provide legal services, however, the advertisement must comply with the Disciplinary Rules, and the use of the phrase "low cost" in the advertisement presented to the Committee does not comply with the Disciplinary Rules.

Applicable Code Provisions

- **DR 2-101(A)** (Avoidance of Misrepresentation About Ability, Background, or Experience)
- **DR 2-101(B)** (Representations That are Likely to Deceive)

- **DR 2-102** (Professional Notices)
- **DR 3-101(A)** (Aiding Non-Lawyers in the Unauthorized Practice of Law)
- **DR 3-102(A)(3)** (Sharing Fees With a Non-Lawyer Employee)
- **DR 3-103** (Forming a Partnership With a Non-Lawyer)
- **DR 5-107(B)** (Avoiding Influence by One Who Recommends, Pays, or Employs a Lawyer to Represent Another Person)
- **DR 5-107(C)** (Prohibition Against Non-Lawyer Director, Officer, or Shareholder in Professional Corporation or Association Practicing Law for Profit)
- **EC 2-8B; 2-10; 3-8; 5-21; 5-22; 5-24**

Inquiry

The inquirer is an attorney in the District of Columbia who is considering advertising in a trade magazine for the cellular radiotelephone industry. He submits a copy of another group's advertisement in the same magazine, which reads, in part:

COMPLETE CELLULAR
LOTTERY APPLICATIONS

THE LOW COST ALTERNATIVE

A Joint Venture
of Cellular Professionals

The advertisement then lists four firms, including a Washington law firm that engages in, among other areas of practice, communications law. The inquirer asks three questions concerning the advertising sample:

1. May a law firm jointly advertise with non-lawyers?
2. If so, may a law firm that is advertising with non-lawyers not identify itself as such?
3. Is "low cost" a permissible phrase to be used in a legal advertisement?

Discussion

I. Participation In A Joint Venture

The threshold issue in relation to joint advertising, of course, is whether the joint venture itself complies with the applicable Disciplinary Rules regarding participation by lawyers in a venture with non-lawyers. That issue was not raised by the inquirer, and the Committee expresses no opinion on that issue here. For the interest of the inquirer, however, the Committee notes that such a joint venture should carefully observe the several Disciplinary Rules under Canons 3 and 5, and the Ethical Considerations that support them, that apply to the activities of lawyers who practice with non-lawyers.[1] In addition, Opinions No. 10, 93, and 146 are applicable to the issue of joint enterprises between lawyers and non-lawyers, and make it clear that, while professional associations between lawyers and non-lawyers are not strictly proscribed where non-legal work is to be performed, such groups must be carefully structured to insure that no legal work is performed by the joint enterprise, and to insure that no billing for legal services will be allowed by the joint enterprise.

II. *Advertisement As A Joint Venture*

If the Disciplinary Rules concerning joint practice with non-lawyers are not infringed, then joint advertisement, by itself, presents no problem under the Disciplinary Rules. The Committee has given extensive consideration to the extent and kinds of advertisement that lawyers may employ, however, and it is therefore necessary to analyze the specific advertisement to determine whether it is permissible under the Disciplinary Rules.

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[1]The Disciplinary Rules that apply to joint ventures by lawyers with non-lawyers include DR 3-101(A) (A lawyer shall not aid a non-lawyer in the unauthorized practice of law); DR 3-102(A)(3) (A law firm shall not share legal fees with a non-lawyer, except in certain instances for non-lawyer employees); DR 3-103(A) (A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law); DR 5-107(B) (A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services); and DR 5-107(C) (A lawyer shall not practice with or in the form of an association authorized to practice law for a profit, if a non-lawyer owns an interest therein, a non-lawyer is a corporate director or officer thereof, or a non-lawyer has the right to direct or control the professional judgment of a lawyer).

The applicable Ethical Considerations include EC 3-8 (A lawyer should not aid or encourage a layman to practice law, nor should he practice law in association with a layman or otherwise share legal fees with a layman); EC 5-21 (A lawyer must disregard the desires of any third person who may impair his free judgment); EC 5-22 (A lawyer is less likely to be subject to economic, social or political pressures by third parties if he is compensated directly by the client and if his professional work is done exclusively with the client); and EC 5-24 (In the interest of preserving the lawyer's professional independence, he should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer).

A. *Failure To Identify Law Firm*

The first issue is whether the failure of the law firm to identify itself as such presents a problem under the Disciplinary Rules. DR 2-102(B) provides, in pertinent part:

> A lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading or deceptive within the meaning of DR 2-101(B), or is contrary to law.

Similarly, DR 2-102(A) provides, in pertinent part:

> A lawyer or law firm shall not use or participate in the use of a professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing or similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading or deceptive within the meaning of DR 2-101(B) . . .

DR 2-101(B) provides, in turn, that a representation is false, fraudulent, misleading, or deceptive if it includes a statement or claim which, among other things:

> (1) Contains a material misrepresentation of fact; [or]
> (2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading.

The Ethical Considerations that apply to the question of whether joint advertising is permissible, and whether such joint advertisement must identify the law firm, include EC 2-11, which provides, in pertinent part:

> The name under which a lawyer conducts his or her practice may be a factor in the selection process. The use of a name which could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder is not proper.

Also relevant is EC 2-10, which provides, in pertinent part

> The Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding falsity, deception and misrepresentation.

Finally, EC 2-8B provides, in pertinent part:

> Not only must commercial publicity be truthful but its accurate meaning must be

apparent to the layperson with no legal background.

While the Committee, in Opinion No. 53, allowed an advertisement for legal services to omit the name of the lawyer involved, such advertisement must at least make it clear that legal services are to be provided. The instant advertisement is different in that, not only is the law firm not identified as such, but it is unclear whether, and to what extent, legal services will be provided as part of the package. Under these circumstances the advertisement is at best misleading to the layperson and is not permissible under the Disciplinary Rules if the law firm will be offering legal services to the public in connection with its participation in the joint venture.

If the offering of legal services is anticipated as part of the package to be offered by the joint enterprise, joint advertisement is permissible only where the law firm in the joint enterprise makes it clear in the advertisement that it is a separate entity and will separately be providing legal services of a specific nature.

B. *Use of the Phrase "The Low Cost Alternative"*

DR 2-101(B)(5) is very specific regarding the types of statements that are and are not permissible in the advertisement of legal fees.[2] In addition, DR 2-101(A) provides, in pertinent part:

> A lawyer shall not knowingly make any representation . . . about the fee . . . that is false, fraudulent, misleading, or deceptive, and that might reasonably be expected to induce reliance by a member of the public.

EC 2-8B clearly requires that fee information be completely and accurately stated, while our Opinions 53, 81 and 121 make it clear that no statements regarding fees are permitted except those listed in DR 2-101(B)(5)(a)-(f).

Applying these strictures to the use of the phrase "Low Cost Alternative," it is clear that this vague and relative phrase, when applied to the provision of legal services, is prohibited by DR 2-101(A) and (B).

Inquiry No. 84-2-6
Approved April 15, 1986

Opinion No. 173

Responsibility of Attorney Employed By Insurer to Insured

- An attorney hired and paid by an insurance company to represent an insured owes the insured the duty of zealous, competent representation, and may not allow his relationship with the insurance company to hinder proper representation of the insured.
- The attorney, however, has the right to receive adequate compensation for his services, and may take steps to withdraw if he will not be compensated for work he is asked by the insured to perform.

Applicable Code Provisions

- **DR 2-110(A)(2) and (B)(4)** (Withdrawal from Employment)
- **DR 1-105(B) and (C)** (Refusing to Continue Employment if the Interest of Another Client May Impair Independent Professional Judgment)
- **DR 5-107(B)** (Avoiding Influence by Others Than the Client)
- **DR 6-101** (Failing to Act Competently)
- **DR 7-101** (Representing a Client Zealously)

Inquiry

Inquirer's firm acts as general counsel for a client sued for false arrest and malicious prosecution. The complaint and summons were forwarded to the client's insurance company, which acknowledged coverage and appointed an attorney to file an answer. Inquirer's firm conferred with defense counsel before the answer was filed and discussed the inclusion of a compulsory counterclaim. Defense counsel responded that, since his client was the insurance company, he did not feel obligated to file the counterclaim.

The compulsory counterclaim involves allegations that plaintiff interfered with the client's business. The client had been compelled to call the police and have the plaintiff ejected.[1] Whether the contract between the insurance company and the insured relieves the insurance company of the obligation to file the compulsory counterclaim apparently is disputed.[2]

After defense counsel filed the answer, inquirer's firm entered an appearance as co-counsel for the client and obtained leave to amend the answer to add the counterclaim. The client now has advised inquirer's firm that the client does not wish to incur any attorney's fees to prosecute the counterclaim and has ordered inquirer's firm to terminate work on this case.

Inquirer asks the following questions:

1. To whom does the insurance company attorney owe his allegiance?
2. Does the attorney appointed by the insurance company have an obligation to file a compulsory counterclaim?
3. Can inquirer's firm now withdraw as co-counsel for the client?
4. If inquirer's firm does withdraw, is the attorney appointed by the insurance company responsible for prosecuting the counterclaim?

Discussion

A lawyer representing an insured at the insurer's behest has two clients—the insurer and the insured. Nonetheless, the lawyer owes the insured the same duties and loyalties as he would owe any other

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[2]DR2-101(B)(5) provides that a statement or claim is false, fraudulent, misleading, or deceptive if it relates to legal fees other than:

(a) A statement of the fee for initial consultation;
(b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;
(c) A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;
(d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter;
(e) The availability of credit arrangements; and
(f) A statement of the fees charged by a qualified legal assistance organization in which he or she participates for specific legal services the description of which would not be misunderstood or be deceptive.

[1]Rule 13 of the Superior Court of the District of Columbia describes "compulsory counterclaim" as follows:

> (a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

[2]This committee, of course, is not empowered to decide whether or not the contract between the insurer and the insured relieves the insurer of the obligation to finance a compulsory counterclaim.

client. These include the duty not only to represent the client "competently" without neglect, but also to represent it "zealously." *See* DR 6-101(A)(3) and DR 7-101. *See also* EC 7-1.

Several other code provisions also are directly applicable to the present matter. DR 5-107(B) provides:

> A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

Moreover, DR 5-105(B) and (C) provide:

> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

This latter provision is particularly applicable to the insured/insurer situation as EC 5-17 makes clear.

> Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, *an insured and his insurer*, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely. (Emphasis added)

The nature of the lawyer's duties to the insured has been discussed both by the courts and in several opinions of the American Bar Association. For example, in *American Employers Ins. Co. v. Goble Aircraft Specialities*, 205 Misc. 1066, 1075, 131 N.Y.S.2d 383, 401 (1954), *motion to withdraw appeal granted*, 1 App. Div. 2d 1008, 154 N.Y.S.2d 835 (1956), the court said:

> When counsel, although paid by the casualty company, undertakes to represent the policy-holder and files his notice of appearance, he owes to his client, the assured, an undeviating and single allegiance. His fealty embraces the requirement to produce in court all witnesses, fact and expert, who are available and necessary for the proper protection of the rights of his client . . .
>
> . . . The Canons of Professional Ethics make it pellucid that there are not two standards, one applying to counsel privately retained by a client, and the other to counsel paid by an insurance carrier.[3]

The ABA in Formal Opinion No. 282 stated in 1950:

> Under certain circumstances a person may by contract clothe another with power to retain a lawyer to conduct a defense. Especially may this be done when, as here, the power is coupled with an interest resulting from covenants of insurance. . . . The essential point of ethics involved is that the lawyer so employed shall represent the insured as his client with undivided fidelity as required by Canon 6.

See also, to the same effect, ABA Informal Opinions 1475, 1402, 1370, 949, 822 and C-728.

This discussion leads to several general conclusions. First, a lawyer cannot permit the insurer that hires him and pays his fees to direct him to refuse to file the insured's compulsory counterclaim. Second, the lawyer cannot continue to represent the insured where the insurer has a different interest and the lawyer's performance for the insured will be affected adversely by that different interest, unless each client consents after full disclosure and it is "obvious" the attorney adequately can perform the functions the insured wishes him to perform. *See, e.g.*, Opinions Nos. 49, 143, 154. In the immediate circumstance, it appears that the insured as yet has *not* consented to the refusal to file the compulsory counterclaim, and thus it does not appear "obvious" that defense counsel can represent the insured adequately without filing the compulsory counterclaim.[4]

On the other hand, a lawyer representing an insured is not ethically compelled to perform legal work without a fee. To the contrary, under DR 2-110(C)(1)(f), withdrawal expressly is permitted when the client "[d]eliberately disregards an . . . obligation to the lawyer as to expenses or fees." In the present situation, it appears that neither the insurer nor the insured is willing to finance the counterclaim.

These considerations cause us to conclude that, assuming the insurer is resolute, defense counsel should inform the insured that it may choose one of the following three options regarding the conduct of this litigation:

(1) Defense counsel will continue to represent the insured and will pursue the compulsory counterclaim if the insured pays for that work.[5]

(2) Defense counsel will continue to represent the insured, but will not pursue the compulsory counterclaim if the insured declines to pay for it.

(3) Defense counsel will withdraw from the case.

If the client refuses to pay for the compulsory counterclaim but insists that it be pursued, defense counsel must either pursue it or withdraw from the case.

Inquirer also asks whether his firm now can withdraw as co-counsel for the client in the situation described. We answer this question in the affirmative. Indeed, withdrawal is mandatory under DR 2-110(B)(4) since the firm, as to this matter, has been "discharged by [its] client."

A withdrawing firm has certain obligations to its client, as made clear by DR 2-110(A)(2), which provides that:

> . . . a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

The facts presented to us indicate that inquirer's firm has taken reasonable steps to avoid "foreseeable prejudice to the rights" of its client. It has informed the client that a compulsory counterclaim exists and should be filed. Recognizing this, and recognizing that defense counsel appointed

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[3]This quotation appears in a note to EC 5-17.

[4]Filing a compulsory counterclaim may be as much a part of a "defense" as filing an answer or raising an affirmative defense.

[5]Defense counsel also might, for example, offer to pursue the compulsory counterclaim if the client placed a sufficient amount in escrow that would be available to pay fees if the dispute as to who should fund the counterclaim is resolved in the insurance company's favor.

by the insurer has declared that he will not pursue the counterclaim, the client nonetheless has asked inquirer's firm to withdraw. In this situation, inquirer's firm has done all it is required to do by the Code, and it may withdraw.

Inquiry No. 86-6-25
Adopted May 20, 1986

Opinion No. 174

Application of Screening Mechanism to a Law Firm That is Disqualified Due to an Attorney's Past Private Employment

• Absent informed consent by all affected parties, the screening procedures provided by DR 9-102(B) and (C) with respect to an attorney who moves from government practice to private practice are not sufficient to prevent disqualification of the partners and associates of an attorney engaged in private practice when he is personally disqualified from participating in a matter because of confidences or secrets which actually or constructively came into his possession while previously associated with another private law firm.

Applicable Code Provisions

• **DR 4-101(B)** (A Lawyer Shall Not Knowingly Reveal a Confidence or Secret of His Client Nor Use a Confidence or Secret of His Client to the Client's Disadvantage)

• **DR 5-105(D)** (Attribution of Disqualification)

• **DR 9-102** (Imputed Disqualification of Partners, Associates and of Counsel Attorneys of Former Government Attorneys)

Inquiry

The inquirer asks whether implementation of the screening procedures provided by DR 9-102(B) and (C) with respect to former government attorneys would be sufficient to protect a law firm from disqualification from a matter from which the screened lawyer was barred because of his personal participation in a matter or confidences or secrets which came into his possession during his previous association with another private law firm.

Discussion

DR 5-105(D) in effect in the District of Columbia[1] provides:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule other than DR 2-110(B)(3) or (B)(4) or DR 6-101(A)(1), or in appropriate cases, DR 5-101(A), no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment, provided that any imputed disqualification or restrictions that attach because a lawyer was a public employee shall be determined under Canon 9.

In this case, it is assumed that the disqualification of the attorney in question is based on either or both of two grounds: (1) by application of DR 4-101(B) because of confidences or secrets actually conveyed to him during his previous employment with another private firm or (2) because, by application of the substantial relationship test applied under DR 4-101(B), his previous personal involvement in a matter was such that he is presumed to have come into possession of confidences and secrets that would be relevant to the same or a substantially related matter in which his new firm has been asked to participate.[2] Thus, it is assumed that the individual attorney is personally disqualified from participating in the matter and that personal disqualification does *not* arise from application of any of the four rules mentioned as possible exceptions to application of the general principle stated in DR 5-105(D).[3]

As recognized by the inquirer, upon conformity to the screening provisions of those rules, DR 9-102(B) and (C) affirmatively permit private firms to accept representations from which they would otherwise be barred because of activities during government service of partners or associates of such firms who are former government attorneys, even if consent is not obtained. However, it is clear that by their terms and history those provisions were intended to address the specific circumstances of former government lawyers. In effect, an exception to the attribution rule was thought necessary in the specific case of former government attorneys because, otherwise, the broad range of matters upon which government lawyers may become involved might act as an unfair handicap to attorneys who have engaged in public service and an unwarranted impediment to the government's efforts to encourage attorneys to engage in government service.[4]

Because neither DR 9-102(B) nor (C) nor any of the other possible exceptions identified in DR 5-105(D) apply to the facts presented, we find the general principle stated in DR 5-105(D) inescapable. Aware that lawyers engaged in practice together feel free to and do discuss among themselves matters in which their firm is engaged, the draftsmen of that rule concluded that confidences or secrets in the possession of one participant in a firm should be treated as in the possession of all.[5] Absent informed consent by all clients involved, or a specific exception provided by the text of the rule or in other rules, DR 5-105(D) forbids a firm or any of its partners, associates or counsel from becoming or remaining engaged in a matter from which any of their number is personally disqualified.

Of course, a quite different situation would exist if the former client consented to representation by its former lawyer's

[1]DR 5-105(D), as set forth, was adopted by the District of Columbia Court of Appeals by Order of July 28, 1981. Prior to that Order, the rule was identical to the ABA Model Code of Professional Responsibility DR 5-101(D) which reads as follows: "If a lawyer is required to decline employment or withdraw from employment under the Disciplinary Rules, no partner, or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment."

[2]As discussed in our recent Opinion 164, in moving from one law firm to another a lawyer brings with him only disqualification from matters in which he was personally involved or about which he personally came into possession of confidences or secrets. Upon changing firms, the attribution principle applies only at the new firm and not at the old.

[3]Of the rules referred to in DR 5-105(D) as presenting possible exceptional circumstances, DR 2-110(B)(3) relates to disqualification by reason of a mental or physical condition; DR 2-110(B)(4) relates to discharge by a client; DR 6-101(A)(1) to a matter the lawyer is personally incompetent to handle and; DR 5-101(A) to a lawyer's personal financial interests.

[4]For a summary of the legislative history of DR 9-102(A) and (B), see the D.C. Court of Appeals' Order of April 30, 1982 ("Revolving Door").

[5]We also note that, having given the issue thorough consideration, both the American Bar Association and the District of Columbia Bar Model Rules of Professional Conduct Committee (Model Rules Committee) have recommended that this distinction between the attribution rules applicable to former government lawyers and lawyers moving from one private firm to another be maintained. *See* ABA Model Rule of Professional Conduct 1.10 and Report of the Model Rules Committee to the Board of Governors of the D.C. Bar, pp. 74–79 (Sept. 9, 1985).

new firm on condition that the individual lawyer who previously represented the consenting party be personally screened from the matter. In our Opinion 158 we concluded that upon full disclosure a former client may consent to permitting a lawyer who personally represented the client to represent another client against it. It follows, therefore, that a former client of a lawyer who has moved from one private firm to another can take the lesser step of permitting the present partners and associates of that lawyer to represent an adverse party against it on condition that the lawyer personally involved in a disqualifying representation at his prior firm be personally screened from involvement. The difference between a move from one private firm to another and from the government to a private firm is that screening is sufficient without consent to permit representation by the former government attorney's new firm, whereas, despite screening, consent is still required in the case of a move from one private firm to another.

Inquiry No. 86-5-22
Adopted June 17, 1986

Opinion No. 175

Consecutive Representation of Potentially Adverse Clients and Use of Legal Theories Developed at Expense of the Former Client

• A lawyer is not prohibited, after termination of his/her represention of one client, from commencing the representation in an unrelated matter of a second client who may take action adverse to the first client, or from using legal theories in the subsequent representation that were developed during the first representation, so long as the subsequent representation does not create a conflict between the duty to competently represent the second client and the duty to preserve the confidences of the first client.

Applicable Code Provisions

• **DR 2-110** (Withdrawal From Employment)
• **DR 4-101** (Preservation of Confidences and Secrets of a Client)
• **DR 5-105** (Refusing to Accept Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer)
• **DR 9-101** (Avoiding Impropriety or the Appearance of Impropriety)

Inquiry

The inquirer, an attorney in solo practice, was formerly employed by a law firm. While employed by the law firm and representing its clients, he developed what he considers to be novel legal theories that could be used to attack a certain federal law. After terminating his employment with the law firm, the inquirer was asked to represent other clients who compete with the clients of his former firm.

The inquirer anticipates that his new clients will take certain actions which will injure the business interests of the clients of his former firm. He further anticipates that in response, the clients of his former firm will invoke the federal law referred to above and that his new clients will wish him to attack that law using the novel theory he developed while representing his former firm's clients. If an attack on the statute based on that theory is successful, he believes that the result will be a major blow to the competitive position of his former firm's clients.

The inquirer asks this Committee to address several issues. First, after termination of representation of one client may an attorney undertake the representation of a second client whose interest will potentially be in direct conflict with the former client? Second, if so, may the attorney use legal knowledge and theories acquired or developed while representing the former client for the benefit of the new client? And, third, must the attorney disclose to the former client his intention to represent a new potentially adverse client?

Discussion

The Code of Professional Responsibility now in effect in the District of Columbia does not contain any provisions which directly govern the question of serial representation of adverse private clients.[1] For example, while Canon 2 of the Code sets forth considerations pertaining to the termination of representation, it does not indicate whether the client has a legally protected interest, after termination, in legal theories developed by the attorney during the former representation. Similarly, Canon 4 expressly prohibits the disclosure of client confidences, but it makes no mention of legal theories developed during a representation. Canon 5 cautions against the simultaneous representation of clients whose interests are adverse or even potentially adverse, but it does not address directly serial representation of adverse clients. Finally, Canon 9 relates to the appearance of impropriety and prohibits government attorneys from changing sides in the "same matter," but it does not address private attorneys "switching sides." in different matters.

We have, however, considered the purposes of those rules, and based upon that consideration the Committee is of the opinion that, so long as the representation proposed is not in the same or a substantially related matter as that involved in the first representation, and so long as no client confidences or secrets conveyed in the course of the first representation are relevant to the second (which based upon the inquirer's representations we assume to be the case in the situation addressed), the attorney is free to represent the second client, even though the two clients' interests are potentially adverse. We also conclude that, having undertaken that representation, the attorney may use legal expertise and theories gained or developed during the former representation in behalf of his new client, and, indeed, he would be obligated to do so if necessary to providing adequate representation to his new client. Finally, since it is presumed that no confidences or secrets were actually or presumptively disclosed by the former client that would require consent to use or disclosure, the lawyer need not obtain the consent of his former client to assume the new representation.

A. *Multiple Representation*

In this case, it is clear that the attorney could not simultaneously represent both his former clients and the new client which wishes to take a position adverse to them. DR 5-105(B) provides that:

> A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another

[1]We note that Rule 1.9(a) of the ABA Model Rules of Professional Conduct under consideration for adoption in this jurisdiction does directly address the issue of serial representation of adverse private clients. That Rule states:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
> (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation. . . .

By its terms the proposed Rule, like the existing "substantial relationship test" applied under DR 9-101(B) and DR 4-101(B), would not prohibit representation where the new matter is not the "same" as or "substantially related" to the prior representation.

client, or if it would be likely to involve him in representing differing interests.

However, the situation presented is not one of simultaneous, multiple representation, since the inquirer had withdrawn from his former firm and representation of its clients before he was asked to represent the new client. Rather, the question is, may the inquirer represent first one and then the other in separate matters, if their interests are adverse in the second matter? Thus, by its terms DR 5-105(B) simply does not apply.

B. *Client Confidences*

The obligation to preserve the confidences and secrets of a client continue after the attorney-client relationship has ended. DR 4-101(B) provides that:

> Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Opinion No. 96 of this Committee has made it clear that "the duties of confidentiality and loyalty that are enjoined upon a lawyer who has obtained protected information continue after the termination of the privileged relationship." *See also* Opinion 158. This continued protection of confidences and secrets is deemed necessary to encourage the full disclosure of relevant information between client and counsel that is essential to effective representation. Thus, violation of the duty of confidentiality to a former client has been the basis for disqualification motions as well as disciplinary action. *See generally*, Note, "Developments in the Law—Conflicts of Interest in the Legal Profession," 94 *Harv. L. Rev.* 1244 (1981).

In this inquiry, the inquirer maintains that no facts or other knowledge or information imparted by the former clients are involved in the subject of the subsequent representation. He states that only a general knowledge of a particular area of law is required. The Committee assumes this representation to be true for the purposes of this inquiry. If that were not true, the necessity of preserving client confidences or secrets would require a different conclusion in response to this inquiry.

The Committee also assumes for purposes of this opinion that the subject matters of the two representations are not the same or substantially related,[2] so that no *presumption* of the utilization of the former clients' confidences arises.[3] Where the former client actually imparted confidential information to the attorney or where the former and subsequent representations are found to be substantially related so that confidences are presumed to have been imparted, this Committee has found that the subsequent representation is permissible only with the informed consent of the former client. Opinion 158. However, where disclosure of a former client's confidences or secrets are not at stake, no general duty of loyalty to the former client prohibits subsequent representation of adverse interests, and it is not necessary that the consent of the former client be obtained before the new representation is undertaken. Opinion 171.

In reaching this conclusion, it is our opinion that a legal theory developed while retained by a client is not a "client secret" within the meaning of DR 4-101(B). DR 4-101(A) defines a "secret" as nonprivileged "information" gained in the professional relationship the disclosure of which would be detrimental to the client. It is the Committee's opinion that legal theories, whether novel or not, developed by a lawyer during a representation are not "information" gained in the course of representation within the meaning of the rule. For the reasons stated below, the Committee finds that the rule was not intended to preclude the subsequent use of legal ideas developed or acquired while retained by a former client, even when the subsequent use of those ideas will adversely affect the former client.

A lawyer is useful to his clients because of his knowledge of the law and how it can be applied to different factual situations. Such knowledge is not gained through formal legal training and post-graduate courses alone, but also from the everyday practice of the law while representing various clients. The Code of Professional Responsibility would surely place an unbearable burden upon every legal practitioner if it prohibited the use of such knowledge except for the benefit of the client whom he happened to represent when he acquired it. Legal expertise consists of layer upon layer of knowledge and experience gained gradually through the representation of many clients in many situations. It is not something that can be parsed and sold exclusively to any one client.[4] The usual attorney-client relationship does not include such expectations.

The rationale underlying the prohibition against the disclosure of confidences and secrets is the encouragement of fulldisclosure by the client of information relevant and necessary to the optimal representation of the client's interests. The subsequent disclosure of legal theories would not discourage such full disclosure of facts, motives and objectives by a client, and thus the policy advanced by Canon 4 is not jeopardized by the subsequent use of such theories.

Furthermore, it is an underlying policy of the Code that attorneys should become increasingly knowledgeable about the law and use their growing expertise to represent clients to the best of their ability.[5] Thus, the inquirer was ethically obligated to use his evolving expertise for the benefit of the first client while he represented that client, and he is, likewise, obligated to use his expertise for the benefit of all of his subsequent clients. Canons 6 and 7. Unless there are confidences or secrets provided by a client to be protected, which, for the reasons stated above, the Committee assumes there are not in this case, a lawyer is not prohibited from using legal knowl-

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[2]In determining whether matters are "substantially related," the D.C. Court of Appeals has required that the facts, legal issues and parties be substantially the same in the prior and subsequent representations. Brown v. D.C. Board of Zoning Appeals, 486 A.2d 37 (D.C. App. 1984). *See also* Opinions 96 and 130.

[3]In Brown v. D.C. Board of Zoning Adjustment, *supra*, the Court of Appeals held that the "substantial relationship" test involved in so-called revolving door cases involving former government attorneys arising under DR 9-101(B), and that applied to successive representation of private clients under DR 4-101(B), is the same. That test raises a presumption that where a second representation is in a matter substantially related to a former representation, confidences that could be used against the former clients' interests were disclosed. The courts do not require the former client to prove that confidential information was actually imparted, because in order to do so the client would have to divulge the very information to be protected. *See, e.g.*, Wilson P. Abraham Construction Corp. v. Armco Steel Corp., 559 F.2d 250 (5th Cir. 1977) (per curiam).

[4]Indeed, DR 2-108(B) and this Committee's Opinions 35 and 130 prohibit settlement agreements which seek to circumscribe an attorney's future practice in similar ways.

[5]*See generally* Canon 2 regarding the duty to make legal counsel available, Canon 6 regarding the duty to competently represent a client, and Canon 7 regarding the duty to represent a client zealously within the bounds of the law.

edge gained in the representation of past clients, even when representing subsequent clients whose positions are adverse to those of former clients.

C. *Avoiding the Appearance of Impropriety*

Finally, the Committee concludes that Canon 9 does not prohibit an attorney from using legal theories developed while representing one client on behalf of a subsequent client in a matter adverse to the former client. Because it is presumed that the new matter in which the attorney is retained by his new client is not the same or "substantially related" to the matters in which he represented his former firm's clients, DR 9-101(B) would not apply even if the inquirer were a former government attorney. Moreover, as we stated in our Opinion 78 and reiterated in Opinion 171, "the former...client should no longer expect any loyalty," since, except for protection of client confidences and secrets, that obligation ceases with the termination of the attorney-client relationship, and, indeed, Canon 7 requires that a lawyer provide zealous and undivided loyalty to his continuing and new clients.

Inquiry No. 85-6-27
Adopted July 15, 1986

Opinion No. 176

Ethical Propiety of Union Attorneys' Receiving a Market Value Fee Award

• It is not unethical for union attorneys to receive a market value fee award that is deposited in a legal assistance fund used only by attorneys to provide legal services for union members.

Applicable Code Provisions

• **DR 3-101(A)** (A lawyer shall not aid a non-lawyer in the unauthorized practice of law)

• **DR 3-102(A)** (A lawyer shall not share legal fees with a non-lawyer)

• **DR 5-107(B)** (A lawyer shall not permit the entity that employs him to direct or regulate his professional judgment)

Inquiry

The committee has received two similar inquiries that ask whether it is unethical under the District of Columbia Code of Professional Responsibility for a salaried attorney employed by a federal employee labor union to accept an attorney's fee award calculated at the prevailing market rate when such fees will be deposited in the union's separate legal representation fund. The funds involved apparently are used solely by the unions' lawyers to finance legal work for their members. Awards of legal fees benefit the unions by allowing them to forego expending funds for such legal work.

Discussion

These inquiries are prompted by the decision of the United States Court of Appeals for the Federal Circuit in *Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984). That opinion limits fee awards to a union's salaried attorneys to the actual amount the union expended in providing legal representation, *i.e.*, the lawyer's salary plus the union's overhead expenses. The court, relying on various ethical considerations discussed below, ruled that labor union attorneys may not be awarded market value for their services.

Goodrich relied on *National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981). There the Court of Appeals for the District of Columbia Circuit, citing three disciplinary rules, limited a union's recovery of attorneys' fees to the union lawyer's salary plus the union's expenses. The court cited DR 2-103(D)(4)(a) of the American Bar Association Model Code of Professional Responsibility, which then permitted lawyers to work for an organization providing prepaid legal services only if "[s]uch organization,...is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers...."[1] The court also relied on DR 3-102, which prohibits lawyers from sharing fees with non-lawyers, and on DR 3-101(A), which prevents a lawyer from assisting laymen in the unauthorized practice of law.

The union involved in *National Treasury* had acknowledged that all fees awarded its attorneys were deposited *in the union's general* treasury. The court found that the union "would profit—perhaps handsomely—on legal activities of [its] lawyers under any arrangement whereby market-value fees wend their way into the union's general treasury." *Id.* at 852. However, the Court remarked that market value fee awards "are appropriate when the monies are to become the attorney's own; perhaps, too, such allowances would withstand criticism when the *monies are directed into a fund for maintenance of a legal services program.*" (emphasis added) *Id.* at 855.

Taking comfort from this last statement, the unions involved in the present inquiries and other public employee unions have established separate litigation or legal representation funds into which all fee awards are deposited. The monies in such funds generally are available only to the unions' attorneys to defray legal representation costs.

The District of Columbia Circuit has approved this type of arrangement. In *Jordan v. Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982), an attorney at the Institute for Public Representation at Georgetown University Law Center was awarded market rate compensation for his successful representation in a Freedom of Information Act litigation. The Court "assume[d]" that the Institute would deposit any fee award beyond recoupment of actual expenses into a fund maintained "exclusively for litigation."[2] The Court cited its holding in *National Treasury* "that it is improper for an entity not licensed to practice law to partake in attorneys' fees representing the market value formula...*where its portion is not to be placed in a fund dedicated solely to litigation.*" 691 F.2d at 516, n. 14. If this were not done, the court indicated, such an entity "would participate in a long-prohibited division of fees with an attorney." *Id.*

The Federal Circuit in *Goodrich* failed to cite *Jordan* in finding the receipt of market value attorney fees unethical. Rather, the Federal Circuit relied on the Merit Systems Protection Board's[3] ruling in *Wells v. Schweiker*, 82 FMSR ¶ 7053 (1982), which concluded that, even if attorney's fees are used solely for legal representation, the market value formula still allows a union "to profit from the underlying activities of its attorneys" to the extent that the union need not "financ[e] its litigation activities through its general revenue funds." *See also*, in the same vein, *Powell v. Department of the Treasury*, 81 FMSR ¶ 7076 (1981), also cited in *Goodrich*. The *Goodrich* court, *supra* at 1579-80, quoted the observation in *National Treasury* that "the settled expectation of the union employer and the employed attorneys that all fees recovered

[1]Such a provision is no longer in the ABA's Model Rules.

[2]Because we perceive no conceptual reason not to do so, we interpret this last phrase to include funds maintained exclusively for legal assistance that involves legal work other than just litigation.

[3]The MSPB is an administrative agency that, *inter alia*, decides challenges by federal employees to adverse personnel actions.

belong to the union means that the employing lay organization would capitalize on the attorney's services, *reap a profit therefrom*, and put the monies thus made to any use it so chooses." *National Treasury, supra,* at 853. (emphasis added).

Thus, the two federal appellate courts that sit in the District of Columbia have reached different conclusions as to the ethical propriety of receiving market rate fee awards for deposit into a separately maintained legal assistance fund. We, of course, are not empowered to resolve conflicts among the circuits as to matters of federal law, a task we leave to the Supreme Court. Our opinion is limited strictly to an interpretation of the District of Columbia Code of Professional Responsibility. We find that the arrangements inquirers present are not forbidden by our Code.

As discussed above, the Federal Circuit in *Goodrich* relied on the ABA's DR 2-103(D)(4)(a) that prohibited a lay organization providing legal services from making a profit from its attorneys' work. ABA DR 2-103(D) specified those organizations that properly could recommend legal services to an individual in need of legal assistance. These included certain legal aid or public defender offices (DR 2-103(D)(2)), a bar-approved lawyer referral service (DR 2-103(D)(3)), and "any bona fide organization that recommends, furnishes or pays for legal services to its members," provided it met numerous conditions (DR 2-103(D)(4)). One of these conditions was that "[s]uch organization...is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers...." DR 2-103(D)(4)(a).

However, the District of Columbia Court of Appeals chose not to adopt the ABA's DR 2-103(D) and the District of Columbia Code thus does not expressly prohibit a lay organization from profiting in these circumstances. We believe the Court's failure to adopt the ABA's DR 2-103(D)(4)(a) is significant. At the least it indicates that, in this jurisdiction, it is not improper, so long as other Code provisions are not contravened, for an organization to "profit" indirectly from the legal services it recommends to its members.

This conclusion also informs our interpretation of other pertinent provisions that *are* in effect in the District of Columbia. Those are DR 3-102, which prohibits a lawyer from sharing legal fees with a non-lawyer, and DR 3-101(A), which prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law. These two provisions, in our view, must be read in light of the District of Columbia Court of Appeals' refusal expressly to prohibit an organization from profiting from the legal services it recommends to its members.

It is unclear whether a market value fee award necessarily would violate DR 3-102 and DR 3-101(A) even if it were not deposited in a separate legal assistance fund.[4] It is, however, clear that no ethical restriction exists under either of these two rules where market value fees are placed in a separate fund to be used solely by the union's lawyers to finance legal assistance, even if the umbrella organization receives some indirect benefit from this arrangement. The *Jordan* case concludes that such a situation does not amount to "a long-prohibited division of fees with an attorney." 691 F.2d at 516, n.14. In other words, at least where there is a separate legal assistance fund, fees are not "shared" with a lay entity, as that term is used in the Code.

Moreover, as EC 3-8 notes, a principal purpose of these provisions is to prevent laymen from practicing law. At least in the circumstance where the fees are deposited in an account that is separate from the union's general treasury and used only by union lawyers for legal assistance, we do not believe a union is encouraged to practice law by market rate fee awards. Nor do we believe that the attorneys' independent professional judgment will be compromised in this situation since the clients and the union that recommends counsel to them normally have the same goals. *See* DR 5-107(A); Opinion 93. *Cf. NAACP v. Button*, 371 U.S. 415, 443 (1963).

Our decision in these regards is influenced by two other factors. First, it appears that many fee awards pursuant to the over 100 federal fee shifting statutes must be made at market value rates. *See Blum v. Stenson*, 104 S. Ct. 1541 (1984).[5] To hold that such awards are impermissible in the present circumstances would appear to create a conflict between federal law and ethical requirements.

Secondly, as the sample cases cited in the Appendix indicate, many market value fee awards have been made to attorneys for "umbrella" organizations, including civil rights and environmental organizations. We hesitate to issue a ruling that might unduly restrict fee awards to such organizations in the absence of a clear signal from the District of Columbia Court of Appeals that this was intended. That signal is missing. To the contrary, the Court's declination to adopt a provision preventing such organizations from profiting from legal services strongly indicates that the present arrangement does not contravene our Code.

Appendix

Decisions Sanctioning Market Rate Fees Where Non-Profit Umbrella Lay Organizations Involved

DISTRICT OF COLUMBIA CIRCUIT: *Environmental Defense Fund v. E.P.A.*, 672 F.2d 42 (1982); *Sierra Club v. Gorsuch*, 684 F.2d 972 (1982), *rev'd on other grounds*, ____ U.S. ____ , 103 S. Ct. 3274 (1983) (Sierra Club and Environmental Defense Fund); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (1982) (Corporate Accountability Research Group).

FIRST CIRCUIT: *Palmigiano v. Garrahy*, 616 F.2d 598 (1980) (ACLU National Prison Project); *Reynolds v. Coomey*, 567 F.2d 1166 (1978) (NAACP LDF).

SECOND CIRCUIT: *Carey v. New York Gaslight Club*, 598 F.2d 1253 (1979), *aff'd*, 447 U.S. 54 (1980) (NAACP); *Beazer v. New York City Transit Authority*, 558 F.2d 97 (1977), *rev'd on other grounds*, 440 U.S. 568 (1979) (Legal Action Center); *Torres v. Sachs*, 538 F.2d 10 (1976) (Puerto Rican Legal Defense Fund).

THIRD CIRCUIT: *Pawlak v. Greenawalt*, 713 F.2d 972 (1983) (Public Citizen Litigation Group).

FOURTH CIRCUIT: *Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 1141 (1975) (ACLU).

SIXTH CIRCUIT: *Louisville Black Police Officers Organization v. Louisville*, 700 F.2d 268 (1983) (NAACP LDF); *Northcross v. Board of Education of Memphis*, 611 F.2d 624 (1979), *cert. denied*, 447 U.S. 911 (1980) (NAACP LDF).

SEVENTH CIRCUIT: *Gautreaux v. Chicago Housing Authority*, 690 F.2d 601 (1982) (ACLU); *Mary and Crystal v. Ramsden*, 635 F.2d 590 (1980) (Youth Policy and Law Center).

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[4]We decide only the issues before us, which involve separate legal representation funds. We reserve for another day and another factual situation the question whether the receipt of a market value award would be unethical if it were not deposited in a separate legal assistance fund.

[5]In *Blum* the Court said (at 1547):

> The statute and legislative history establish that "reasonable fees" under [42 U.S.C.] § 1988 are to be calculated according to the prevailing market rates in the relevant community, *regardless of whether plaintiff is represented by private or nonprofit counsel.* (emphasis added).

NINTH CIRCUIT: *Brandenburger v. Thompson*, 494 F.2d 885 (ACLU).

TENTH CIRCUIT: *Ramos v. Lamm*, 713 F.2d 546 (1983) (ACLU); *Love v. Mayor*, 620 F.2d 235 (1980) (ACLU).

DISTRICT COURTS: *Schwabenbauer v. Board of Education*, 515 F. Supp. 33 (W.D.N.Y. 1983) (New York State United Teachers); *National Trust for Historic Preservation v. Corps of Engineers*, 570 F. Supp. 465 (W.D. Ohio 1983); *Allen v. Terminal Tansport Co.*, 486 F. Supp. 1195 (N.D. Ga. 1980) *aff'd*, 638 F.2d 1232, *cert denied*, 445 U.S. 989 (1982) (Washington Research Project); *Unemployed Workers Organizing Committee v. Batterton*, 477 F. Supp. 509 (D. Md. 1979) (ACLU Baltimore); *Gunther v. Iowa State Men's Reformatory*, 466 F. Supp. 367 (N.D. Iowa 1979) (Iowa CLU) *Howard v. Phelps*, 443 F. Supp. 374 (E.D. La. 1978) (ACLU); *Harkless v. Sweeney Independent School District*, 466 F. Supp. 457 (S.D. Tex. 1978), *aff'd*, 608 F.2d 594 (5th Cir. 1979) (NAACP LDF); *Keyes v. School District No. 1*, 439 F. Supp. 393 (D. Colo. 1977) (Mexican American Legal Defense and Education Fund, NAACP LDF); *AFGE v. Rosen*, 418 F. Supp. 205 (N.D. Ill. 1976) (American Federation of Government Employees); *ASPIRA of New York, Inc. v. Board of Education*, 65 F.R.D. 541 (S.D.N.Y. 1975) (Puerto Rican Legal Defense and Education Fund), *Consumers Union of the United States v. Board of Governors*, 410 F. Supp. 63 (D.D.C. 1975); *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975) (NAACP LDF).

Inquiry Nos. 86-2-12
86-8-32
Adopted October 21, 1986

Opinion No. 177

"Revolving Door": Personal and Substantial Participation

• Former chief administrative hearing examiner may not accept private employment in any case in which she participated personally and substantially while a public employee, including cases in which she was consulted informally by other hearing examiners.

Applicable Code Provisions

• **DR 9-101(A)** (A Lawyer Shall Not State that He or She is Able to Influence Improperly any Tribunal)

• **DR 9-101(B)** (A Lawyer Shall Not Accept Private Employment with Any Matter in Which He or She Participated Personally and Substantially as a Public Employee)

• **DR 9-102(B)-(E)** (Screening Procedures Where Law Firm Employs a Personally Disqualified Lawyer)

• **DR 5-101(A)** (Absent Client Consent, a Lawyer May Not Represent a Client if the Exercise of His or Her Professional Judgment May Be Affected by His or Her Own Financial, Business, Property, or Personal Interest)

Inquiry

The inquirer formerly was employed by a District of Columbia government agency that administers a particular legislative act (the Act). While employed by the District government, the inquirer was in charge of an office that employed lawyers to act as hearing examiners in cases arising under the Act. The hearing examiners conducted hearings and issued recommended decisions. Their decisions are appealable to the director of the District government agency (not the inquirer) and, beyond that individual, to the District of Columbia Court of Appeals.

As head of the hearings office, the inquirer was responsible both for administrative matters and for supervising all staff, including the hearing examiners. The inquirer also acted as a hearing examiner in some cases.

It was the inquirer's responsibility to assign cases either to herself or to one of the other hearing examiners. Once she assigned a case to a hearing examiner, that examiner's responsibilities included acting on any motions, conducting a hearing, and writing a recommended decision. The inquirer did not participate directly in any of these activities except, of course, in her own caseload. However, the inquirer states that the hearing examiners frequently consulted her concerning various substantive aspects of their cases, e.g., the best way to rule on a motion. These consultations often were informal in nature, with the case name often not being mentioned.

The inquirer also reviewed all recommended decisions, orders, notices and correspondence. While her review sometimes was limited to proofreading, she states that she reviewed recommended decisions and more complex orders for "organization, format, clarity of thought, conformity to existing case law, grammar and other general editorial comment." She further states that while she did not disturb the hearing examiners' findings regarding witness credibility, admissibility of evidence, or the appropriate disposition of the issues, she "did have the authority to suggest possible alternatives which the hearing examiner was free to accept or reject as he or she saw fit."

Regarding the confidentiality of the proceedings, the inquirer states that all documents filed with the office and all evidence submitted at a hearing are matters of public record. She then adds, "The only matters privileged are the Hearing Examiners' decision-making process and the result of any matter pending in which no disposition has yet been issued."

The inquirer is now employed by a private law firm and has asked numerous questions concerning the extent to which she can represent private clients in cases before her old office and on appeal from decisions of that office. She also asks whether any restrictions may apply to her current firm in representing individuals before her old office and any restrictions on her discussing various matters pertinent to her former employment with her firm. Finally, she asks whether there are any restrictions on her writing various articles related to her former government employment.

Discussion

1. *General Considerations: Personal and Substantial Participation*

DR 9-101(B) provides that "A lawyer shall not at any time accept private employment in connection with any matter in which he or she participated personally and substantially as a public officer or employee, which includes acting on the merits of a matter in a judicial capacity." The inquirer asks a number of questions concerning the propriety of representing in private practice clients whose cases were pending before her former office while she still was employed by the government. The issue raised is whether the inquirer "participated personally and substantially" in the cases described by her inquiry.[1]

This Committee has addressed this issue in four opinions, all of which were issued prior to April 30, 1982. Before that date, the disciplinary rules under Canon 9 of the District of Columbia Code of Professional Conduct were the same as the former American Bar Association Model Code of Professional Responsibility. DR 9-101(B)

[1]Since the inquirer asks about cases that were pending while she was a public employee, the same matters are involved. Thus, no issue is raised regarding the interpretation of "matter," as used in DR 9-101(B).

then prohibited a former government lawyer from accepting private employment in a matter in which he had "substantial responsibility." The Committee's opinions interpreted and applied that standard.

On April 30, 1982, the District of Columbia Court of Appeals amended the disciplinary rules under Canon 9. DR 9-101(B) was amended to prohibit private employment in any matter in which the former government employee had "participated personally and substantially." The Court order effecting the amendments neither defined this amended phrase nor explained its purpose.[2] However, this Committee proposed the change to the Court, with the purpose of conforming the language of the disciplinary rule to that used in 18 U.S.C. 207(a), the Ethics in Government Act. The Committee did not intend the change in language to have a significant, practical effect. Thus, what the Committee stated in interpreting "substantial responsibility" still is relevant in determining whether the inquirer here "participated personally and substantially" in the cases described by her inquiry.[3]

Both the language of DR 9-101(B) and our past opinions emphasize that it is the former government employee's degree of personal involvement in a given matter that must be considered, rather than the overall degree of involvement of the individual's work unit. Thus, in Opinions 111 and 16, the fact that the inquiring attorney was formerly the Assistant Director of the Office of Contract Administration did not automatically preclude him from undertaking subsequent, private representation with respect to all contracts for which his former office was accountable. The Committee specifically excluded from its consideration those contracts for which the inquirer had no responsibility. However, in all contracts where he was assigned responsibility, his degree of involvement in the process that led to the contract awards was sufficiently "substantial" to prohibit him from representing private clients in any claims or disputes under those contracts.

Similarly, in Opinion No. 84, a lawyer was prohibited from representing a private client where his previous involvement in a government proceeding against the client's competitor was "direct, extensive and substantial, not peripheral, clerical or formal." However, in Opinion No. 111, the Committee found that "the words, 'peripheral, clerical and formal' almost perfectly describe the role the inquiring attorney played in the matter in question while in government service." Consequently, the attorney could represent a private party in the same litigation, even though his private client's position was adverse to that taken by the attorney's former government employer.

These opinions consider not only the attorney's personal role in a given matter, but also express the Committee's concern that the policy considerations underlying DR 9-101(B) be served. As quoted in Opinion No. 111, ABA Formal Opinion 342 succintly states these concerns:

> The policy considerations underlying DR 9-101(B) have been thought to be the following: the treachery of switching sides; the safeguarding of confidential governmental information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil.

It is against the language of the rule, the above policy considerations, and our past opinions that we turn to the particular cases about which the inquirer has asked.

2. *Subsequent Representation in Cases Pending Before Inquirer's Former Office While She Was in Charge.*

A. *Cases Where a Hearing Application Was Received But No Assignment Was Made Before Inquirer's Resignation.*

One of the inquirer's functions as head of the office was to assign cases to herself and to other hearing examiners. The inquirer assigned cases after the docket section received and docketed an Application for Hearing and opened a case file. Inquirer states that the docket section operated without her direct supervision and that she rarely saw a case file until after the docket section had processed it. As noted above, the Hearing Application and case file are public records.

Thus, in a case where only a hearing application had been received prior to her resignation, without the inquirer having assigned the case to a hearing examiner, the inquirer had no personal involvement with that case, substantial or otherwise, that would prevent her from later representing private clients in that case. To find otherwise would amount to prohibiting her from undertaking representation in any case that had been filed with the inquirer's former office prior to her resignation without any regard to her personal involvement in the case, a step this Committee declined to take in Opinion Nos. 111 and 16.[4]

B. *Cases Where Assignment to Another Hearing Examiner Was Made But Inquirer Was Not Otherwise Involved.*

Inquirer next asks if she can represent private clients in cases in which her only involvement was assigning the matter to another hearing examiner in her office: "there was no discussion with [her] concerning any matter arising in the case." Where the inquirer's *only* involvement in a case was to assign it to another hearing examiner, we conclude that this task was sufficiently clerical in nature that it does not constitute "substantial" participation within the meaning of DR 9-101(B).

Inquirer states that she assigned cases to the hearing examiners in rotational order. She did not consider any personal factors in determining which case to assign to a particular hearing examiner. Furthermore, the hearing applications are public records and contain little more than the parties' names and addresses and the names and addresses of counsel. There was space for a "statement of claim" where applicants usually described the physical injury that gave rise to their claim under the Act.

In concluding that assigning cases to the other hearing examiners does not amount to "substantial" participation, we consider as determinative the routine method of assigning cases and the limited, non-confidential information contained in the case files at the point at which an assignment was made. Thus, concerns that, in assigning cases, the inquirer learned confidential information are allayed.

C. *Cases Assigned to Another Hearing Examiner Where Action Beyond Assignment and Scheduling Was Taken.*

We emphasize that our conclusion above is limited to those cases where the inquirer's *only* participation in a case was to assign it to a hearing examiner. The inquirer states that she frequently was in-

[2]*See* "Revolving Door," 445 A.2d 615 (D.C. App. 1982).

[3]As footnote one to Opinion No. 111 commented, the revision that was then pending before the District of Columbia Court of Appeals (and that was adopted one month later) would codify the interpretation already given DR 9-101(B), at least concerning personal involvement by a former government employee.

[4]This conclusion also answers inquirer's question regarding whether she can participate in cases in which the hearing application was filed *after* she resigned. In that instance, she is even more removed from participation in the matter than when the hearing application was received before her resignation.

volved to a significant extent in other hearing examiners' decision-making processes. She reviewed recommended decisions and substantive orders, and the hearing examiners "frequently sought [her] opinion...concerning all aspects of the development of various cases, including the best way to rule on pre-hearing, hearing and post-hearing motions or other issues and the development of new case law." In addition, because of the informal manner in which hearing examiners sought the inquirer's advice, it is not possible to determine in which cases, if any, she was not consulted.

We conclude that the inquirer is prohibited from accepting private employment in any case in which she reviewed another hearing examiner's recommended decision or substantive order. As noted above, the inquirer's responsibility included commenting upon whether the decision or order conformed with applicable precedent. She also had the authority to suggest "possible alternatives" to the outcome proposed by the hearing examiner. Because these activities involved her in the merits of the case, the inquirer was sufficiently "personally and substantially" involved to come within the prohibition of DR 9-101(B).

We reach the same conclusion regarding those cases in which the hearing examiners consulted the inquirer regarding any aspect of a case. Again, the inquirer's stature as chief hearing examiner and the substantive nature of the consultations requires us to conclude that the inquirer personally and substantially participated in these cases.

Obviously, the conclusion in the preceding paragraph applies to any case in which the inquirer actually was consulted by another hearing examiner. One difficulty in applying this conclusion is that the consultation process was sufficiently informal that the name of the case often was not mentioned. This practice, together with the vagaries of human memory, suggests that the inquirer will be unable to identify by name all cases in which she was consulted. However, the important policies that underlie DR 9-101(B) require that the Committee adopt an approach that will avoid even the possibility of inquirer's using confidential information she learned while employed by the government.

Thus, we conclude that the inquirer is barred from accepting private employment in any case in which a hearing examiner took any action beyond scheduling a hearing, if that case was pending during the inquirer's employment with the government. The only exception to this prohibition would be a case in which the inquirer, based upon objective information beyond her lack of recollection of the case, can assure herself that she had no involvement whatsoever.[5]

D. *Cases Where Inquirer Was the Assigned Hearing Examiner*

Inquirer also asks about those cases where she was assigned to act as the hearing examiner but where nothing had arisen requiring "resolution in [her] capacity as a judge." We assume from this statement that she means that no substantive action had occurred in the case beyond the initial assignment to her, similar to the situation discussed in Section B above.

However, the inquirer wore two hats in her former government employment: she was both the administrative head of the office and a hearing examiner. In the limited circumstances described in Section B above, she acted solely as office administrator and did not personally and substantially participate in a case assigned to another hearing examiner. It is impossible for the Committee to conclude, however, that she did not personally and substantially participate in any case in which she was the assigned hearing examiner. Assignment as the hearing examiner in a given case is *per se* personal and substantial participation, regardless of whether a circumstance had yet arisen that required inquirer's action "as a judge."

3. *Subsequent Representation of Cases on Appeal.*

The framework of the discussion above also responds to the inquirer's questions regarding her participation in cases on appeal that were pending before her office while she was the lawyer in charge. The forum in which the case is pending is not determinative; it is the inquirer's past participation in a matter that is relevant. Thus, if she would be prohibited by virtue of her previous government employment from subsequent participation in a case in one forum, she is prohibited from participation in it in any other forum.

This prohibition includes cases on appeal in which the inquirer reviewed the hearing examiner's recommended decision or discussed any aspect of the case with the hearing examiner. Such reviews or discussions amount to personal and substantial participation on the inquirer's part, given her own description of the detailed nature of these reviews and the substantive nature of the issues she discussed with the hearing examiners in relation to their cases.

4. *Appearance Before Hearing Examiners Whom Inquirer Previously Supervised.*

Inquirer asks whether she may appear before a hearing examiner whom she previously supervised. Obviously, she cannot appear before her former office in cases in which she may not participate, as described above. However, she is not automatically precluded from appearing before the hearing examiners in her former office in cases in which she did not personally and substantially participate.

DR 5-101(A) provides that, absent consent of the client after full disclosure, an attorney may not represent a client if the exercise of his professional judgment on behalf of the client "will be or reasonably may be affected by his own financial, business, property, or personal interests." In applying this rule, we have recognized that the burden falls primarily on the individual lawyer to determine for herself whether a personal or other interest exists that may affect her professional judgment. *See* Opinions Nos. 169, 144 & 112. There is no simple test for making this determination. Rather, the inquirer must carefully consider whether her past supervisory/working relationship with a particular hearing examiner, amicable or otherwise, will or may affect her ability to represent her client.

Even if the inquirer determines that appearing before a hearing examiner whom she previously supervised may adversely affect her professional judgment, the client can consent to the inquirer's representation after she makes full disclosure to the client. To make full disclosure, the inquirer must disclose her past working relationship with the hearing examiner and explain the possible consequences of that relationship, if any, on her ability to represent her client. The explanation also should stress that her previous employment does not afford her any influence with or special access to her former office or its hearing examiners. *See* DR 9-101(A).

5. *Discussions Within Current Firm Pertaining to Former Employment.*

The inquirer asks whether she can discuss three topics with her current firm: (1) her "impressions, based on [her] experience...of the quality and effectiveness of expert witness..."; (2) her "impressions based on discussions with other Hearing Examiners of the other Hearing Examiners' assessments of the quality and effectiveness of expert witnesses"; and (3) her

[5]In Opinion 150, the Committee placed a similar burden on an attorney in demonstrating her lack of access to confidential information and her lack of involvement in a particular matter while employed by the government.

"impressions of the Hearing Examiner's philosophical approach to resolving legal and factual issues and of other factors bearing on the Hearing Examiner's decision-making process as [she] observed it..." Provided that the inquirer is careful to protect any confidential information she may have learned, nothing prohibits her from these types of discussions with her current employer.

While DR 9-101(B) restricts a lawyer from private employment in certain matters, it does not prevent a lawyer from using in private practice the general expertise or knowledge that she gained while she was a public employee. As the ABA recognized in Opinion 342, DR 9-101(B) should not be construed to restrict unduly a government lawyer's future employment. Consequently, the rule focuses on whether the lawyer "participated personally and substantially" in a particular "matter." Only when such participation is found is it presumed that the former government employee learned confidential information and thus is prohibited from any subsequent participation in the same or substantially related matter. *See generally Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. App. 1984); Opinion No. 150.

DR 9-101(B) is not designed to prohibit a government employee from accepting private employment in the same field in which he or she was employed while with the government. If it were so construed, the government's ability to recruit lawyers to its ranks would be severely curtailed since acceptance of government employment would place harsh restraints upon a lawyer's future practice of law.

The inquirer's situation differs little from that of a judge's law clerk who learns that judge's personal opinions, approaches and biases from discussions with and observations of the judge. To prohibit her from discussing either her personal views or another hearing examiner's views on general matters would unduly restrict her ability to move to private practice and would deter lawyers from entering government employment. Of course, as stated above, she must be sensitive to the need to protect any confidences or secrets that were gained in her previous employment.

6. *Publications Related to Former Employment*

Inquirer asks whether there are any restrictions on her writing either a case law summary of the opinions that her former office issued or articles "addressing any aspect of the [office] which does not purport to provide insight into the decision-making process." As the above discussion states, nothing prohibits a former government lawyer from later applying the expertise that he or she learned while working for the government.

Neither of the proposed publications appears to violate DR 9-101(B) or the concerns that underlie it. We assume that the opinions to be summarized are matters of public record and that each case summary would be limited to a summary of only the public opinion. Thus, there is no concern that publication of a case law summary would violate any confidence the inquirer may have learned regarding a particular opinion.

The description of the second proposed publication is more vague. However, inquirer states that only the discussions between her and the hearing examiners involving the decision-making process in individual cases were confidential. All other matters were in the public record. In publishing articles related to her former employment, as in discussions about it, she must protect any confidences or secrets that she gained. However, DR 9-101(B) would not be violated by publishing, for example, an article on the use of expert medical testimony at a hearing.[6]

7. *Restrictions on Current Employer in Handling Cases Before Inquirer's Former Office.*

DR 9-102 creates screening procedures that protect private firms from disqualification based upon the previous activities of a former government attorney who is personally disqualified from participating in representation undertaken by the firm. DR 9-102(B) requires the personally disqualified attorney to be screened from "any form of participation in the matter of representation..., and from sharing in any fees resulting therefrom." We have interpreted this provision to require that fees generated from a matter in which a lawyer is disqualified and screened may not be used for the personal compensation of that lawyer. Opinion No. 162. DR 9-102(C)-(E) established the formal procedures that must be followed when a lawyer is screened from participation.

Provided that the inquirer is properly screened from *any* participation in those cases where she is personally disqualified under DR 9-101(B), her current employer can accept employment from or continue to represent clients in cases where the inquirer is disqualified from participation.

Inquiry No. 85-12-46
Adopted October 21, 1986

[6]To the extent that any confidential information may be revealed, the inquirer at a minimum would need to obtain the consent of her former employer. *See* Opinion No. 128.

Opinion No. 178

Attorney's Communications With One With an Adverse Interest

• An attorney representing a suspect during a criminal investigation may not secretly record an interview of a witness represented by an attorney conducted on the consent of the witness's attorney but must disclose to the witness's attorney his intention to record the interview.

Applicable Code Provisions

• **DR 1-102** (Misconduct)
• **DR 7-104** (Communicating With One of Adverse Interest)
• **Canon 9** (Appearance of Professional Impropriety)

Inquiry

Lawyer A represents the subject (or "target") of a grand jury inquiry. Lawyer A wishes to interview a witness who has provided information and documents that Lawyer A considers to be exculpatory of his client. This evidence may also implicate the witness in the alleged offense. The witness has an attorney, Lawyer B, representing him in connection with the investigation. Lawyer A obtained the permission of Lawyer B to conduct the first interview and to examine the records. He decided to meet again with the witness in order to clarify the statements made during the first interview and to examine the records further. Lawyer B consented to the second interview and record inspection as well.

Attorney A concluded that the witness would not provide the same information in testimony before the grand jury or at trial. After the most careful consideration, he also concluded that the witness would not consent to the interviews if they were openly recorded in any fashion. Thus, the lawyer intends to surreptiously record the second interview by wearing a microphone and portable tape recorder. Lawyer A did not inform Lawyer B of his intention to secretly record his interview of the witness, Lawyer B's client. We are advised that the secret recording of the interview without the witness' knowledge or authorization would not violate the laws of any jurisdiction involved in the matter.

Discussion

DR 7-104(A)(1) provides that:

> During the course of his representation of a client a lawyer shall not:
>
> Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party . . .

At least in the facts of the present circumstance, there would be a violation of the Disciplinary Rules by Attorney A if he obtained the "consent" of a witness's attorney without disclosing that the interview of the witness was going to be recorded. In the absence of such disclosure, we believe the consent is not an informed one.

Disciplinary Rule 7-104(A)(1) applies to this situation. That is, we view DR 7-104(A)(1), relating to communications by an attorney with a "party" represented by a lawyer, as applicable to the circumstances of this case.

The word "party" is not defined in the Code, and we think that it should be interpreted in a common-sense manner. There need not be some actual pending charge against the witness before he or she would be entitled to the protection that DR 7-104(A)(1) affords. We do not here conclude that every witness who has undertaken to obtain advice of counsel is entitled to be considered a "party" within the meaning of DR 7-104(A)(1); but the circumstances of the present case require the application of DR 7-104(A)(1): a grand jury investigation was underway. The witness appeared to be exposed to potential criminal charges or penalties, and had engaged counsel in connection with the investigation. EC 7-18 says in relevant part:

> "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a *person* he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person." (Emphasis added.)

Moreover, the Committee's Opinion 80, which dealt with complex issues of communications by an attorney with government officials who are represented in their official capacity by attorneys, and the attendant interest in access to government, has no application to the present situation.

Ironically, in the present circumstance the witness, after having obtained a lawyer to shield and protect him, would likely be lulled into a false sense of security and confidentiality in the interview, particularly after the interviewing attorney obtained the consent of the witness's attorney. That at least could reasonably be foreseen to happen. Whatever may be the standard created by DR 1-102(A)(4) in dealing with prospective witnesses, we believe that the standard of professional conduct for members of the bar toward one another is such that a request by an attorney to another attorney to interview the second attorney's client obligates the requesting attorney to inform the witness's attorney if the interview is going to be recorded.

Inquiry No. 85-8-31
Adopted January 20, 1987

Concurring Opinion of Four Members to Opinion No. 178

Agreeing with everything the Committee says, we would say more. We believe that this is not a close case, for the following reasons:

1. Most importantly, we believe, the secret recording violated DR 1-102(A)(4), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." This was a case of deceit, if that word has any meaning. The inquirer had a duty to disclose exactly what activity he was seeking consent for. He did not do so. Moreover, apart from deceiving the witness's attorney, by the secret recording he undeniably deceived the witness himself. DR 1-102(A)(4) prohibits deceit of members of the public. It is not limited to deceiving fellow members of the bar.

2. Even if there had been a full disclosure to the witness's attorney of the intention to record surreptitiously, and even if that attorney with full knowledge had consented, such consent would have been ineffective. No attorney has authority to consent to his client being tricked. No attorney consistently with DR 7-101 and the very concept of the profession could agree to set up his own client.

3. The conduct also violated DR 7-104(A)(1), which prohibits a lawyer from communicating with a represented party without the consent of that party's attorney, or if "authorized by law to do so." Any witness who is as involved in the subject matter of a grand jury investigation as was this one is a "party" of the sort protected by the Rule and fits exactly within its purpose. Nothing in Opinion 80 decided otherwise. As for consent, to permit the interview of one's client is not equivalent to consenting that he be surreptitiously recorded. To allow one sort of communicative encounter is not to consent to a different kind. And the proviso concerning "authorized by law to do so" must refer to a positive statutory authorization rather than mere absence of prohibition. Otherwise DR 7-104(A)(1), because few conversations are by law prohibited, would become meaningless.

4. The New York opinion relied on in the dissent in our view is not persuasively reasoned. The better view is the contrary one of ABA Opinion 337. Symmetry with the position of prosecutors should not be the controlling consideration. Moreover, because as we see it the essence of the infraction here is deceit, even a statute authorizing prosecutors to record secretly would not settle the question. The restrictions on prosecutors are not before us, but prosecutors are attorneys, too. The Code of Professional Responsibility sets for lawyers a higher standard than merely what the law tolerates. Lawyers under the Code are subject to many restrictions and duties of fair dealing that no statute demands. That should apply to attorneys who are prosecutors as well. And even if the Committee some day were to take the New York view and decide otherwise as to prosecutors—a case not before us—it is not for us to conclude that two wrongs make a right.

5. The references to an attorney's duty of zeal in representation beg the question. Zealous representation, if unchecked by the ethical standards of the Code, would soon lead to a jungle terrain of bribery, destruction of evidence, subornation of perjury, and such. *But see* DR 7-102(A). The Code is designed to lift the practice of law above the state of nature. The duty of zeal is real, and is the starting point of the inquiry. But it cannot be the end.

Dissenting Opinion of Four Members to Opinion No. 178

I.

A majority of the Committee has concluded that the attorney making this inquiry has violated DR 7-104(A)(1). We believe that that conclusion is not supported by the majority's opinion and cannot be squared with any interpretation of that provision.

To begin with, there is a real question as to whether the witness should be considered a party in this matter. On the one hand, he certainly appears to be a potential co-defendant if the grand jury returns an indictment. On the other hand, the

Committee has previously concluded that DR 7-104(A)(1) applies only in circumstances "...where the word 'party' is applicable in a relatively formal sense"—that is the person or entity involved "...as a named party in litigation [or] is a party in interest in negotiations short of litigation (and so a prospective party in litigation if negotiations fail)..." (Opinion No. 80).

Here, however, the inquiring attorney sought the consent of the witness's attorney. Thus the question whether the witness's attorney may fairly be said to have consented to the second interview when he did not know that it would be recorded is squarely presented. Put another way, did the inquiring attorney's failure to disclose the forthcoming tape recording invalidate the other attorney's consent because that consent was obtained through a misrepresentation? This question thus implicates Disciplinary Rules under both Canon 1 and Canon 7.

This Committee has not previously been asked to explicate the meaning of the terms "dishonesty," "fraud," "deceit," or "misrepresentation" found in DR 1-102(A)(4). Nor have those terms been discussed by the District of Columbia Court of Appeals in any context resembling the situation presented in this inquiry. Within the context of the prohibition of DR 7-102(A)(7) against assisting a client in fraudulent conduct, the Committee has equated the term "fraudulent" with "false and misleading" (Opinion No. 79) and has observed that "'...'fraud" almost always means acts of affirmative misrepresentation rather than failure to disclose material facts.'" (Opinion No. 119) (citation omitted). The majority and concurring opinions suggest no reasoned or principled basis for departing from this analysis in the DR 1-102(A)(4) context.

It may well be that the witness's attorney should have been more cautious in consenting to the interview of his client. Correlatively, the inquiring attorney would clearly have been required and still is required not to respond falsely to any inquiries by the other attorney regarding the recording of the interview. But we can discern no requirement in the Canon 1 or Canon 7 disciplinary rules that the inquiring attorney, on his own initiative and in the absence of any questions on the matter, should have affirmatively disclosed his intention to record the interview. If the inquiring attorney had such an obligation in this situation, is every attorney prohibited from taking notes during a witness interview, or dictating a memorandum immediately after an interview unless he or she has the permission of the witness's attorney to do so? The answer is clearly in the negative. Any other answer allows the witness's attorney, in effect, to prescribe the other lawyer's conduct of the case and, ultimately, to control the parameters of the other attorney's work product. Yet the majority's conclusory position dictates precisely this result.

II.

We also disagree with the conclusion in the concurring opinion that the surreptitious tape recording constituted "dishonesty, fraud, deceit or misrepresentation" in violation of DR 1-102(A)(4) or involved "conduct that is prejudicial to the administration of justice" in violation of DR 1-102(A)(5).

We recognize that, relying in part on DR 1-102(A)(4), the ABA's Committee on Ethics and Professional Responsibility concluded that a lawyer may not record any conversation without the consent of all parties to the conversation. (ABA Op. 337, 1974). Previously, the ABA Committee had determined that the former Canons of Ethics[1] proscribed secret recordings by lawyers of conversations with clients and other attorneys. (ABA Informal Opinions 1008 and 1009, 1967). Against the background, in Opinion 337, the ABA Committee felt that it could not "...make a distinction in principle" between clients and attorneys on the one hand and "'other persons'" such as witnesses. Accordingly, the ABA Committee concluded:

> If undisclosed recording is unethical when the party is a client or a fellow lawyer, should it not be unethical if the recorded person is a layperson? Certainly the layperson will not be likely to perceive the ground for distinction.[2]

The ABA Committee also observed that nearly all of the other opinions dealing with the issue had reached the same conclusion.

Notwithstanding these views, we reach the opposite conclusion—*i.e.*, that the inquiring attorney had violated no Disciplinary Rule of the District of Columbia Code of Professional Responsibility by making the secret recording under the circumstances as described to the Committee.

In reaching this conclusion, we rely in part on the reasons stated in Opinion No. 80-95 of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York. In that Opinion, the New York City Committee was asked for advice upon the same narrow question at issue here, *viz*, whether an attorney representing a defendant in a pending or realistically potential criminal prosecution or investigation may secretly record a conversation with a witness. In concluding that secretly recording the interview was not improper, the New York City Committee observed:

> The American Bar Association has opined that secret recordings by lawyers are unethical. ABA Opinion 337. Nevertheless, prosecutors traditionally have used, and continue to use, secret recordings in conducting criminal investigations, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 specifically authorizes the use of secret recordings by the federal government where one party to the conversation has consented. See also New York Penal Law § 250.00 and 250.05. ABA 337, while ambiguous on the point, suggests that its general prohibition of secret recordings may not apply to prosecutors' action under authority of such statutes. Accordingly, as a practical matter, imposing an ethical prohibition on the use of secret recordings by defense lawyers in criminal cases deprives them of an important investigative tool available to and utilized by prosecutors...
>
> ...We believe that the ethical rule as applied in the criminal area must take into account society's judgment, reflected in legislation, that secret recordings are a desirable tool in detecting and proving crime. We believe that a necessary corollary, compelled by fairness and our legal tradition which guarantees the fullest protections to a criminal accused, allows similar investigative tools to be available to lawyers who have undertaken the defense of a person being investigated for, or charged with, a crime.
>
> In 1968, the Omnibus Crime Control and Safe Streets Act was passed, which in Title III created statutory roles for the Attorney General and his delegates, Assistant Attorneys General, in authorizing unconsented to electronic interceptions of conversations, that is, wiretaps and bugs. 18 U.S.C. § 2516. The same statute provided that secret recordings on consent, that is, by a participant to a conversation, were legal, 28 U.S.C. § 2511(d)....Thus ...Congress expected prosecutors to play a role in the making of such records.
>
> The right of persons accused or under investigation in criminal matters to effec-

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[1]Canon 22 provided:

> The conduct of a lawyer before the Court and with other lawyers should be characterized by candor and fairness...

[2]And in a subsequent part of its opinion, the ABA Committee expressly cited Canon 9's aspirational standard of avoiding "...even the appearance of impropriety" in further support of the Committee's conclusion. *See* discussion accompanying n. 3, *infra*.

tive and zealous representation is enshrined in the Sixth and Fourteenth Amendments to the Constitution. Against that background, we find it difficult to conclude that ethical standards are violated by allowing defense counsel to use secret recordings as an investigative technique, when that technique is available to the prosecutor. We are further influenced by the fact that in criminal matters the heightened incentive for perjury, the unwillingness of witnesses "to get involved" by signing statements or voluntarily testifying, as well as investigative advantages already available to the prosecutor, may make secret recordings a particularly important method of investigation and proof for defense counsel. We must also take into account the lawyer's duty of competent, zealous representation under Canons 6 and 7, as those duties apply in the context of criminal cases.

Several other considerations also underlie our conclusion. Unlike the ABA Committee, we do not believe that Canon 9 prohibits the conduct in question here. EC 9-2 recognizes that "[o]n" occasion, ethical conduct of a lawyer may appear to laymen to be unethical,"[3] and this Committee has regularly stressed that ". . . the Canons are not intended to be rules of conduct but only statements of axiomatic norms. . . ." (Opinion No. 101) (See also Opinions No. 70, 82, 114).

Similarly, as discussed in the preceding section, the Committee has never concluded that a failure to disclose material facts may constitute a "dishonesty," "fraud," "deceit" or "misrepresentation." The concurrence would reach such a conclusion in far too cursory a manner. In light of the dearth of other authoritative definitions, we find the observations of the New York City Committee persuasive:

> The prohibition on secret recordings of witnesses, set forth in ABA 337, rests on the general prohibition of deceitful conduct of lawyers found in DR 1-102(A)(4). The deceit of secret recordings does not involve an outright falsehood. Rather it would appear to be considered deceitful because it violates standards of candor and fairness applicable to lawyers. Secret records are, by definition, surreptitious, they smack of trickery, and they otherwise seem contrary to the expectations of persons engaged in conversations with lawyers. The persons being recorded might tend to be more cautious or self protective, or even reluctant to have conversations, with lawyers. The persons being recorded might tend to be more cautious or self-protective, or even reluctant to have conversations, if they knew they were being taped. As a general proposition, we agree that secret recordings by lawyers are inconsistent with the standards of DR 1-102. In addition to the considerations listed above, such conduct, in our view, helps undermine those conditions which are essential to a free and open society.
>
> However, we do not believe that ethical committees are free to determine what conduct is unfair or lacking in candor in a vacuum. Unlike more explicit ethical prohibitions, concepts like candor and fairness take their content from a host of sources—articulated and unarticulated—which presumably reflects a consensus of the bar's or society's judgments. Without being unduly relativistic, it is nevertheless possible that conduct which is considered unfair or even deceitful in one context may not be so considered in another. (See, *e.g.*, the ABA's Proposed Model Rules of Professional Conduct, Rule 4.1, Comment concerning assertions made in settlement negotiations.)
>
> Here, judgments have been made by Congress and state legislatures that the efficient detection and proof of criminal conduct requires that government officials, including lawyers, be free to use secret tape recordings. We agree with ABA 337 that a legislative determination that conduct is lawful does not always make the conduct ethical. However, we believe that in this instance, the legislative and social judgment concerning the use of secret recordings in crime detection is one which does not so plainly diverge from accepted standards of candor and fairness that it is inconsistent with ethical behavior. It is, therefore, a judgment which can and must be given great weight in assessing the ethics of the use of secret recordings by defense lawyers.

This Committee has previously considered some of the ramifications of the prohibition in DR 1-102(A)(5) of ". . . conduct that is prejudicial to the administration of justice." In Opinion No. 119, the Committee found that destruction of documents discoverable in anticipated litigation would violate DR 1-102(A)(5) because such action would be ". . . prejudicial to court's conduct of the pending civil litigation here." Applying that standard to this inquiry, secretly recording a witness interview is not likely to prejudice the conduct of a criminal trial, grand jury investigation, or other criminal investigation; if anything, the ultimate truth-finding purpose of any such proceeding is likely to be facilitated by the additional evidence resulting from recording the interview. Thus we can find no basis for concluding that the secret recording at issue here is prejudicial to the administration of justice.

In summary, the inquiring attorney faced an excruciatingly difficult decision. Other attorneys may not have taken the step that he did on behalf of his client, but no question regarding the *bona fides* of his decision or of his care in analyzing the situation and making his choice has been raised. As a result of his actions, accurate information potentially exculpating his client has been obtained and preserved instead of probably being perjuriously hidden. We are distressed at the implication that this attorney or any other attorney in a similar situation has acted unethically and should now be censured for this conduct.

[3] *Cf* n. 2 *supra*, and accompanying text.

Opinion No. 179

Equity Interest in Client's Business in Lieu of Cash Fees for Representation in a Licensing Proceeding

• Where a lawyer or law firm represents a business in civil or administrative litigation for a governmental license, the lawyer or firm does not violate the disciplinary rules by accepting a reasonable contingent fee that takes the form of a small and noncontrolling equity interest in the client.

Applicable Code Provisions

- **DR 5-103(A)** (Acquisition of Interest in Litigation)
- **DR 2-106(B)** (Excessive Fees)
- **DR 2-110(B)(4)** (Withdrawal from Employment)
- **DR 5-101(A)** (Impairment of Professional Judgment)
- **DR 5-105(A)** (Conflicts of Interest)

Inquiry

A law firm has asked whether it is permissible for an attorney or law firm to receive, in lieu of a cash fee, an equity interest in a business which that attorney or firm is representing in an application for a government (FCC) license. The inquirer also asks whether it makes any difference whether the equity interest is in the form of voting or nonvoting shares of a corporation or a general or limited partnership interest in a partnership.

The firm states that it is making this inquiry because it occasionally learns of law firms that have made such arrangements with their clients and because the inquirer has occasionally been asked whether, in lieu of a fee, it would accept an equity interest in a corporate client which is seeking an FCC license. It appears that it is fairly common for a corporation or partnership to be formed solely for the purpose of applying for an FCC license, and, hav-

ing no other assets, such corporations frequently seek to compensate the attorney retained to make their application in stock instead of cash. The inquirer has rejected these offers due to its belief that they violate DR 5-103 and certain American Bar Association (ABA) ethics opinions. However, the firm requests this Committee's opinion about the ethical propriety of such arrangements.

Discussion

DR 5-103(A) provides that:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
> (1) Acquire a lien granted by law to secure his fee or expenses.
> (2) Contract with a client for a reasonable contingent fee in a civil case.

By its terms, the rule does *not* preclude a lawyer from becoming a partner or shareholder of a client or from accepting stock in a client in lieu of a cash fee. It only forbids acquiring a proprietary interest in a "cause of action" or the "subject matter of litigation," and that prohibition is, in turn, subject to the "reasonable contingent fee" exception applicable to "civil litigation."[1]

The ethical issue arises in the circumstances of this inquiry because in some cases the stock of the client will have no or very little value unless the application which is the "subject matter of litigation" being conducted for the client is successful. In such circumstances it would be overly formalistic to view the corporate stock and the "cause of action" or "subject matter of litigation" as different things. Instead, where a pending application is the only thing which gives any potential value to what would otherwise be mere pieces of paper, we conclude that the integral relationship between the value of the corporation's stock and the success or failure of its application for a license cannot be ignored.

This same conclusion was reached and relied upon by the ABA in its Formal Opinion 279 (1949) which concluded that where a lawyer received stock in a corporation on whose behalf he was engaged in prosecuting an application for an FCC license he had received an "interest in the subject matter of the litigation which he is conducting." The ABA also concluded that in such circumstances the lawyer violated Canon 10, the predecessor of DR 5-103(A).

DR 5-103(A) was also invoked in ABA Informal Opinion 1397 (1977). In that case an attorney had accepted a one-fourth interest in mining claims in lieu of a fee in litigation over their ownership. When the client subsequently sought to replace him, the lawyer refused to withdraw. The ABA Committee concluded that the attorney had violated DR 2-110(B)(4), which provides that a lawyer representing a client before a tribunal shall withdraw from employment if he is discharged by his client. The Committee further opined that the attorney's initial fee agreement had violated DR 5-103(A).

In our view, ABA Informal Opinion 1397 reaches the right result, but reliance on DR 5-103(A) was not necessary to reach it. As recognized by the ABA Committee, DR 2-110(B)(4) requires that a lawyer withdraw from a matter when so directed by his client. In addition, DR 5-101(A) and DR 5-105(A) forbid a lawyer from putting himself in a position where his personal interests conflict with the interests of his client. Thus, in our view it would be unethical without requiring reference to DR 5-103(A) for an attorney to accept and exercise such control over the client that its interests are in any sense actually or potentially subordinated to his own.

As to Formal Opinion 279, we agree with the first step of the ABA's analysis, but not its ultimate conclusion. We share the ABA's view that where a corporation has no asset other than a license application, accepting corporate stock is, in practical effect, the same thing as accepting an interest in the "subject matter of litigation" itself. But, viewing the reality of the situation, it also seems to us that it must be recognized that the stock received is, in substance, a "contingent fee" in a civil case, and thereby, if "reasonable," subject to the exception provided in paragraph (2) of the rule of DR 5-103(A).

Every contingent fee arrangement gives a lawyer a financial stake in the subject matter of litigation. Nevertheless, such fee arrangements are permissible in civil litigation because "it may be the only means by which a layman can obtain the services of a lawyer of his choice." Ethical Consideration ("EC") 5-7. As explained in EC 2-20, contingent fee arrangements historically have been accepted in the United States because "(1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid." (Footnote omitted.) It is also recognized in EC 2-20 that "[i]n administrative agency proceedings contingent fee contracts should be governed by the same considerations as in other civil cases."

Applications for FCC licenses are often contested by numerous other applicants, often including the current licensee. If the license is obtained, the applicant (and its stockholders) may prosper; if not, which is frequently the case, the applicant is likely to cease to exist and its stock becomes worthless. Since the ability to obtain financing also often depends on whether the license is obtained, many applicant entities do not have funds to retain counsel at the inception of the license application process. Such entities, therefore, have a strong interest in obtaining legal services on a basis that does not require outlay of cash, and providing stock in the entity in lieu of cash is one means by which that objective is sought to be achieved. When a lawyer receives an equity interest in such an entity in lieu of cash fees, the value of the "fee," like that of all other stock in the applicant, is directly contingent on the success of the license application.

Of course, it would be possible, and probably preferable, for the client in such circumstances to simply enter into an ordinary cash contingency fee arrangement with its lawyer. If the application is successful, the lawyer will receive so much cash, and, if not, presumably nothing. But, it is also possible that the client expects to be short of cash for some period of time even if its application is successful, and it may not wish to have to sell stock to outsiders in order to raise money to pay its lawyer.

In either event, a fee arrangement in

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[1]Model Rule of Professional Conduct 1.8(j) adopted by the House of Delegates of the American Bar Association on August 2, 1983, retains both a prohibition on the acquisition of proprietary interest in a cause of action or subject matter of litigation and the reasonable contingent fee in civil case exception. However, the D.C. Bar Model Rules of Professional Conduct Committee (the Jordan Committee) deleted Model Rule 1.8(j) entirely, and Rule 1.8(j) is also deleted from the Proposed Rules of Professional Conduct submitted to the District of Columbia Court of Appeals by the Board of Governors of the D.C. Bar on November 19, 1986. If the Rules of Professional Conduct recommended by the Jordan Committee and the Board of Governors are adopted, there will be no prohibition against acquisition of a proprietary interest in a cause of action or subject matter of litigation, as such, applicable to members of the D.C. Bar. This opinion, however, construes the existing disciplinary rules.

which the lawyer is to be paid a small and noncontrolling portion of the client's assets in the form of stock is, in substance, no different in any material respect from an ordinary contingency fee contract in which, upon the occurrence of an event, the lawyer is to be paid so much cash. The payment of a contingent fee in the form of cash or shares should give rise to no difference in interests between the client and its lawyer. Moreover, so long as the stock is a sufficiently small portion of the client's total shares so as not to enable the lawyer to control his own retention or otherwise give rise to possible conflicts of interest, it should make no difference whether the equity interest is in the form of voting or nonvoting shares or a general or limited partnership.

A fledgling business, whose success will depend on obtaining a government license, is precisely the sort of client which may be able to obtain legal representation only through a contingent fee agreement, and we are especially reluctant to interpret DR 5-103(A) in a fashion that will impede the delivery of legal services to those who need them but are not in a position to pay for them up front in cash. However, DR 5-103(A) does not by its terms require that a "need test" be passed. Indeed, EC 2-20 states, "Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter a civil case with any client who, *after being fully informed of all relevant factors*, desires that arrangement." (Emphasis added.)

In addition, any lawyer contemplating such an arrangement should bear in mind that paragraph (2) of DR 5-103(A) requires that such fees be "reasonable," and DR 2-106(B) prohibits attorneys' from accepting fees which are "clearly excessive." The Committee has considered this issue in another context and decided that contingent fee arrangements involving consideration other than cash should be approached with circumspection. In Opinion 115, we considered whether it was proper to represent young performers, artists, or athletes in nonlitigation matters in return for a percentage of the client's eventual revenues. While not forbidding such arrangements, we noted that they require full disclosure to the client that the sums eventually payable to the lawyer may be substantially larger than would be paid on an ordinary hourly basis.

The same disclosure principle stated in EC 2-20 and Opinion 115 applies in the case of a contingent fee to be paid in stock. In this case in order to make the client "fully informed of all relevant factors," the lawyer should, among other things, make sure the client understands that it might be substantially less expensive in the long run to pay the lawyer in cash on a straight hourly basis or as an ordinary cash contingent fee rather than in stock. An equity interest in lieu of a cash fee is permissible only if, after being fully informed, a client prefers to contract for legal services on these terms.

Inquiry No. 84-4-12
Adopted March 17, 1987

Opinion No. 180

Disclosure of Client Confidences and Secrets to Investigating Authorities

• A lawyer may not voluntarily disclose documents and other information constituting client confidences and secrets that relate to a client's past criminal conduct to governmental authorities or in related civil proceedings, even if the lawyer is subpoenaed to testify in the proceedings. A lawyer may, however, disclose such information in response to a final order of a court, and a lawyer may under certain circumstances reveal the intention of his or her client to commit a crime and the information necessary to prevent the crime.

Applicable Code Provisions

• **DR 4-101(B)** (A Lawyer Shall Not Knowingly Reveal a Confidence or Secret of His Client Nor Use a Confidence or Secret of His Client to the Client's Disadvantage.)

• **DR 4-101(C)(3)** (A Lawyer May Reveal the Intention of His Client to Commit a Crime and the Information Necessary to Prevent the Crime.)

• **DR 4-101(C)(2)** (A Lawyer May Reveal Confidences or Secrets When Permitted Under Disciplinary Rules or Required By Law or Court Order.)

Inquiry

The Inquirer requests our opinion concerning the ethical propriety of the past and proposed future conduct of his client, a member of the District of Columbia Bar (hereafter "Attorney"). In order to perform his assigned work with a private law firm, Attorney was allowed access to certain files and to make copies of legal documents to serve as models for his own work. Attorney had no direct contact with the client or clients for whom the work had been performed. In reviewing the file copies Attorney discovered what appeared to him to be a fraud on investors. Attorney informed the partner for whom he worked of his findings and he agreed to look into the matter. Thereafter, it appeared to Attorney that on-going and continuous fraud was being perpetrated on investors in the firm's client and that the partners of the law firm were aware of the apparent fraud and had not withdrawn from their representation of the client or taken other appropriate action.

Attorney terminated his employment with the law firm and contacted a federal regulatory agency having jurisdiction over the client's conduct. He provided the agency with some of the documents copied from the firm's files. Attorney learned from the agency that an investigation had already commenced. Thereafter, Attorney was contacted by the FBI and by the Office of the United States Attorney for another jurisdiction, which is conducting a criminal investigation directed at both the Attorney's former firm's client and the partners in the firm.

Inquirer requests the Committee's opinion with respect to two questions: (i) whether Attorney's voluntary disclosures to the federal regulatory agency violated any provision of the Code of Professional Responsibility in effect in the District of Columbia; (ii) whether Attorney may voluntarily cooperate with the Office of the United States Attorney and may voluntarily appear as a witness in grand jury proceedings and other criminal and civil proceedings growing out of the client's conduct.

Discussion

The two questions posed by this Inquiry raise issues of professional responsibility that go to the heart of the attorney-client relationship and to the duty of attorneys to the public at large. On the one hand, DR 4-101(B) provides that a lawyer shall not knowingly "reveal a confidence or secret of his client," DR 4-101(B)(1), or "[u]se a confidence or secret of his client to the disadvantage of the client," DR 4-101 (B)(2). This requirement of confidentiality is essential to the role of the lawyer in the administration of justice. Thus, EC 4-1 states that "[t]he observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of

the client but also encourages laymen to seek early legal assistance."

The ethical obligation to protect client secrets and confidences is not absolute, however, and may be set aside under certain circumstances that involve the interests of society at large. Under the Code of Professional Responsibility a lawyer may reveal "[c]onfidences and secrets when permitted under Disciplinary Rules or required by law or court order," DR 4-101(C)(2), and a lawyer may also reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." DR 4-101(C)(3). It is these competing directions against which Attorney's conduct in this case must be measured.[1]

I. *Prior Disclosure to Regulatory Agency*

Whether Attorney should have disclosed documents and information to the regulatory agency depends upon (i) the existence of an attorney-client relationship, (ii) the nature of the documents and information, and (iii) the nature of the client's activities and whether or not they were on-going at the time of the disclosure.

(i) "The duty to preserve the confidences and secrets of a client is grounded in the existence of the attorney/client relationship." Opinion 99. Even though Attorney had no direct contact with the firm's client or clients, his employment by the firm established an attorney-client relationship giving rise to a personal obligation of confidentiality under DR 4-101(B). The fact that Attorney left his employment after he learned of the possibly fraudulent conduct by the firm's client and partners did not absolve him of the duty to continue to protect the secrets and confidences of the client since the duty continues after the attorney-client relationship has ended. *E.g.*, Opinions, 14, 58, 83 n.2, 96, 99, 124, and 175.

(ii) Client "confidences" and "secrets" are defined by DR 4-101(A) as follows:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

EC 4-4 states that the ethical precept to preserve the "confidences" and "secrets" of a client is intended to be broader than the evidentiary privilege against disclosure of attorney-client communications. This Committee has accordingly ruled that whether or not information is privileged is not dispositive in determing the scope of the attorney's duty under the Code, and that, unlike the evidentiary privilege, information classified as a secret does not lose that classification because of the nature or source of the information, or the fact that others may be aware of it. Opinion 83.

The Committee does not have sufficient facts to determine whether the documents copied by Attorney or any other information obtained in the course of the representation constitute secrets or confidences within the meaning of DR 4-101(A). However, since Attorney apparently had full access to the client's files before he left the firm it appears likely that the information obtained contains information that is classified as "confidences" or "secrets" under DR 4-101(A) and that its disclosure to regulatory authorities was "to the disadvantage of the client." DR 4-101(B)(2).

(iii) Assuming that the information obtained by Attorney constituted "confidences" or "secrets" of the client, it still may have been proper to disclose the information if it revealed "the intention of [Attorney's] client to commit a crime and the information necessary to prevent the crime." DR 4-101(C)(3). This Committee has not previously been called upon to delineate the scope of DR 4-101(C)(3). We believe, however, that at least several facts must be present before this exception to client confidentiality may be invoked.

First, since the exception in DR 4-101 (C)(3) exists in order to prevent crimes from occurring, the client's conduct which is disclosed must be on-going or planned to take effect in the future; the exception does not permit disclosure of a client's past misconduct. *See, e.g.*, ABA Committee on Ethics and Professional Responsibility, Informal Opinion 1349 (1975); *see also*, ABA Formal Opinions 155 (1936) and 202 (1940) (construing former Canon 37).

Second, the disclosure must relate to the commission of a "crime." Under DR 4-101(C)(3) as presently in effect in the District of Columbia, the type of crimes which a lawyer may reveal are not limited to crimes of violence or other similarly serious crimes.[2] Thus, disclosure may be proper where the client's activities amounted to criminal fraud or violations of other similar provisions of the criminal law.

Third, the only client confidences and secrets which a lawyer may reveal under DR 4-101(C)(3) are those which "reveal the intention of his client to commit a crime and the information necessary to prevent the crime." A lawyer should be careful that he or she does not disclose more information than is necessary to fulfill these narrow purposes. Moreover, while DR 4-101(C)(3) does not state to whom disclosure may be made, the Committee believes that, consistent with the purpose of the exception, disclosure should be limited to those governmental authorities or others who are in a position to prevent the on-going or future crime. The Committee is not in a position to determine whether the regulatory agency to which Attorney made disclosures had authority working alone or in concert with other authorities to prevent the client's fraudulent activities in this case.

II. *Voluntary Disclosure in Grand Jury and Other Proceedings*

Whether Attorney may voluntarily disclose information concerning the former client's activities to the Office of the United States Attorney or in related civil proceedings will also depend upon whether client "confidences" or "secrets" are involved and whether disclosure is necessary to prevent on-going or future crimes so as to bring the exception in DR 4-101(C)(3)

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[1]Whether Attorney was or is "required by law" to disclose the information in his possession, as permitted by DR 4-101(C)(2), is a legal question which is beyond the competence of this Committee to decide.

[2]The nature of client criminal activity that a lawyer should be permitted or required to disclose has been the subject of much debate. Under Rule 1.6 of the Model Rules of Professional Conduct adopted by the American Bar Association, a lawyer is permitted to reveal client confidences and secrets only to the extent "the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." The District of Columbia Bar Model Rules of Professional Conduct Committee retained this provision of the ABA draft but modified it to make disclosure mandatory rather than permissive. The version of the Model Rules recommended to the Court of Appeals by the Board of Governors of the District of Columbia Bar also restricts the type of criminal activity that may be revealed to that which is likely to result in death or substantial bodily harm, but the Board recommended that disclosure be permissive rather than mandatory, as in the ABA version. The Board deleted the requirement that the risk of death or bodily harm be "imminent" and added language to ensure that the client's criminal conduct be conduct which would be prevented by the lawyer's disclosure. Until a new provision is adopted in this jurisdiction, the Committee is constrained to accept the present language of DR 4-101(C)(3) which does not restrict the type of criminal activity that may be revealed.

into play. With respect to the latter inquiry, the Committee believes it is unlikely that disclosure to a grand jury will be necessary to prevent criminal activity since the principal function of that judicial body is to determine whether a chargeable offense has already been committed. If the exception is not applicable, the requirement of confidentiality embodied in DR 4-101(A) prevents the voluntary disclosure of client confidences and secrets to investigating authorities or in legal proceedings.

The Committee has frequently considered whether a lawyer may disclose information protected by DR 4-101(A) to governmental authorities in the course of their official duties. The consistent rule we have followed is that, in the absence of ongoing criminal activity, a lawyer may not voluntarily compromise the client's position. Thus, in one of our earliest opinions, the Committee held that a lawyer who formerly represented a client in connection with a civil investigation by a governmental regulatory agency could not voluntarily disclose his files when they were subpoenaed by a grand jury. Opinion 14.

At the heart of Opinion 14 was the principle that the right to confidentiality belongs to the client or former client and that it is the lawyer's duty to take all necessary steps to protect that right. Thus, the Committee held that, "when documents are subpoenaed or an effort is otherwise made to compel their disclosure, it is the lawyer's ethical duty to a former client to assert on the former client's behalf every objection or claim of privilege available to him when to fail to do so might be prejudicial to the client." *Id.* Further, in order to "minimize the possibility of harm" to a former client, *see* EC 2-32, the lawyer should promptly notify his former client when he receives a subpoena asking for documents if "there is any possibility whatever that the attorney has in his possession any subpoenaed document affecting the interest of his former client, which came into his possession from any source whatever during the course of that representation..." *Id.*[3] Finally, the lawyer who is the subject of a subpoena should not without further judicial order disclose any document as to which the client, or his successor attorneys acting on his behalf, assert an objection or privilege, even if the lawyer believes the objection to be invalid or the privilege unavailable.

The precepts announced in Opinion 14 have been followed without deviation in subsequent Opinions. In Opinion 83, for example, the Committee held that an attorney could not voluntarily furnish information constituting confidences or secrets in response to the discovery requests or investigation by counsel for a party to a civil action in which the attorney's former client was also a party. Opinion 99 involved an attorney subpoenaed to testify before a grand jury regarding alleged criminal conduct by an individual whom the attorney had represented in an unrelated criminal proceeding. While a question existed concerning the existence of an attorney-client relationship during the period covered by the prospective testimony, the Committee ruled that if there is a colorable basis for asserting that the client's statements were made in the course of an attorney-client relationship, and if the client did not consent to disclosure, the attorney was obligated to assert before the grand jury the confidentiality of the statements.

Finally, in Opinion 124, the Committee ruled that an attorney could not ethically disclose to an IRS auditor the names of clients represented by the attorney's firm, without the clients' consent, because, under the facts presented, the disclosure would likely reveal "confidences" or "secrets" of those clients. The duty not to disclose the names voluntarily extended not only to the auditor's informal request but to an administrative summons that might be issued by IRS to obtain the information. If IRS commenced a legal proceeding to compel disclosure, we held, the attorney was obligated, first, to notify the affected clients of the pendency of the proceeding, so the clients could take whatever steps they deemed necessary to protect their interests, and, second, unless the clients consented to disclosure, to assert in the pending proceeding the clients' interest in nondisclosure.

These Opinions define the obligations of Attorney with respect to the criminal investigation of Attorney's former client by the Office of the United States Attorney and with respect to any civil litigation relating to the activities of the client. If the documents and information in his possession constitute "confidences" or "secrets," Attorney may not voluntarily disclose them to the Office of the United States Attorney nor to any opposing attorney in a civil proceeding. If Attorney is subpoenaed to testify before a grand jury or in a civil proceeding he must notify the former client of the subpoena and, absent the client's consent to disclosure, he must assert the confidentiality of the documents and information in the proceeding. Even if Attorney is ordered by a court to disclose the client information, he must not make disclosure until he has given the client an opportunity to appeal the order to a higher tribunal. However, once he has adequately asserted the client's interest in nondisclosure, Attorney ethically may, indeed must, obey a final order of a court directing disclosure.[4] *E.g.*, Opinion 14, 83, 99, 124. "When such an order is received, the attorney's ethical obligation to the client is overridden by the order, and he is obliged to comply." Opinion 83.

Inquiry No. 86-11-44
Adopted March 17, 1987

Opinion No. 181

Restrictions on a Lawyer's Ability to Practice Law

• A law firm may not require a lawyer employed by it to sign an agreement that unduly restricts the lawyer's right to practice law after he or she disassociates from the firm.

Applicable Code Provisions

• **DR 2-108(A)** (Agreements Restricting the Practice of a Lawyer)

Inquiry

The inquirer is an associate with a law firm who, along with every other firm employee, has been asked to sign a "Confidentiality Agreement" as a condition of employment. The inquirer asks whether the terms of this Agreement create difficulties (1) for the firm's attorneys under the Code of Professional Responsibility and (2) for the non-legal support staff.

The Confidentiality Agreement has various sections, all of which apparently have perpetual applicability. Under the first section, the employee agrees that certain specified information shall remain confidential. The five types of "confidential and proprietary information" covered by

[3]Opinion 14 also directed that the lawyer should provide to the former client or to the attorneys now representing the former client copies of or access to all documents called for by the subpoena that relate to the former client so that the attorneys can determine or assist in determining as to which documents claims of privilege should be made. The Committee recognizes that in truly exceptional circumstances posing a risk of personal injury to the lawyer, it may not be feasible for a lawyer to give notice to his or her client of the existence of the subpoena.

[4]DR 4-101(C)(2) states that a lawyer may reveal a client's confidences and secrets "when...required by law or Court order."

this section are: (1) information related to the "internal operations and methodology of clients," (2) "information, materials, and methodology developed by the firm" and its employees, (3) "forms of pleading and practice, documents, correspondence, and other written materials prepared by the Firm," (4) "all information regarding the Firm's contracts, proposals, solicitations of business, and client accounts," and (5) "other categories of information of which the Firm may notify the [employee] from time to time."

Under the second section, the employee agrees that, except to further the work of the firm, he or she will not "without written authorization. . . [m]ake or cause to be made any copies, pictures, duplicates or facsimiles or other reproductions or recordings of any documentation utilized by or developed by the Firm." This section further provides that (except where firm work requires) "such information" will not be removed from the firm's premises, that it will be returned to the firm upon the firm's request or upon termination of employment, that such information will not be disclosed "in any form whatsoever to any other person or business entity," and that the employee will take "reasonable precautions to prevent the information from coming into the possession" of any outside party.

The third section of the Confidentiality Agreement provides that, as to the period after termination of employment, the employee "agrees and convenants not to disrupt, impair or interfere with the business of the Firm *in any way*, whether by way of interfering with or raiding its employees, or disrupting or interfering with the Firm's relationship with its clients, agents, representatives, vendors or otherwise." (emphasis added)

Another section of the Agreement provides remedies in the event an employee violates any term of the Agreement. These remedies include: (1) immediate termination of employment, (2) temporary and permament injunctive relief upon a showing that the employee "has breached, or is about to breach, or threatens to breach, any of the aforesaid promises, covenants or conditions," and (3) payment by the employee to the firm of $150,000.00 as liquidated damages. This section additionally provides that none of these remedies are exclusive of any other remedy the firm may have at law or equity.

The Agreement also requires the employee to pay for the firm's costs and attorney's fees in any litigation that results from activities of the employee "outside the scope" of his or her employment. However, the Agreement also provides that, in any litigation concerning it, the prevailing party is liable for reasonable attorney's fees and costs.

The Agreement is binding upon the parties and their heirs. It is not, however, applicable as to clients of the firm for whom the employee is "principally responsible for the client being a client of the Firm."

Finally, the Agreement states that, unless some other arrangement exists, the employment relationship is "at will." Either party may terminate the employment relationship "without cause and without notice at any time."

Discussion

The basic issue raised by the Confidentiality Agreement is whether it restricts a lawyer's right to practice law in violation of DR 2-108(A).[1] This section reads:

> A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

The Committee has issued three opinions on restrictive attorney employment contracts. Opinion 65 (1979) dealt with an employment agreement that required a lawyer who performed legal services for his former firm's clients to pay 40 percent of his net billings for such services for two years after his departure from the firm. The Committee found that this provision, while not prohibiting a former firm lawyer from representing a firm client, nonetheless restricted the lawyer's right to practice law after leaving the firm.[2] The Committee noted that the provision's "effect is to impose a barrier to the creation of a lawyer/client relationship between the departing lawyer and clients of his former firm."

However, in Opinion 77 (1979), the Committee found that an employment contract that prohibited personal solicitations of firm clients, other than by announcement cards, for three years after a lawyer left the firm did not violate DR 2-108(A), despite the additional requirement that the lawyer pay substantial liquidated damages[3] to the firm for a violation of this contract provision. Holding that a departing attorney was not restricted in practicing law since he could advise the firm's clients of his departure, the Opinion referred to a law firm's legitimate interest in maintaining its clientele. The Committee specifically rejected the position that any inhibition on a lawyer's access to clients is a restriction on his right to practice law.

Similarly, in Opinion 97 (1980), the Committee approved a clause in an employment contract that required an associate "to refrain from contacting clients of the firm for the purposes of retaining such clients for his own services." Informed that the law firm had no objection to mailed announcements, the Committee concluded that, "if the right to send announcements is preserved, the firm may ethically enter into an employment agreement with an associate which limits direct solitication by the associate after termination of his employment."

The American Bar Association has found ethical problems with various covenants that restricted an attorney's right to practice law. Moreover, a number of court decisions have struck down restrictive agreements on the grounds that they violate the disciplinary rules and thus are contrary to public policy. It is useful to examine these ABA and court decisions, which generally evince considerable distaste for restrictive agreements.

The ABA's position is that covenants that restrict a lawyer's right to practice law lead to a bartering of clients and are inconsistent with a potential client's interest in obtaining counsel of his or her choice. Its view is that the client's freedom to employ counsel of choice outweighs a lawyer's interest in protection against potential unfair competition for clients.

In ABA Formal Opinion 300 (August 7, 1961), the ABA Standing Committee on Ethics and Professional Responsibility stated: "[A] general covenant restricting an employed lawyer, after leaving the employment, from practicing in the community for a stated period, appears to this Committee to be an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status." Observing "that a restrictive covenant of the type described would be an attempt to barter in clients", the Committee concluded that it is improper both for an employer-lawyer

[1]This Committee is empowered only to express opinions on attorneys' obligations under the Code of Professional Responsibility and consequently we decline to decide whether the Confidentiality Agreement creates ethical problems for the law firm's non-lawyer personnel.

[2]Opinion 65 also found that DR 2-107(A) (Division of Fees Among Lawyers) was violated.

[3]$4,000.00 for each year of employment, plus the amounts of the bonuses awarded the lawyer in each year of employment.

to offer such a contract and for an employee-lawyer to accept it.

ABA Informal Opinion 1072 (October 8, 1968) extended the prohibition announced in Formal Opinion 300 to cover restrictive covenants between law partners.[4] These two Opinions predated the Model Code of Professional Responsibility and were based upon Canon 7.

In Informal Opinion 1171 (February 4, 1971), the ABA Committee ruled that DR 2-108(A) of the Model Code of Professional Responsibility condemned a partnership agreement that prohibited a withdrawing partner for two years from performing "legal services of any kind, either directly or indirectly, for any person, firm or corporation who is a client of the firm or of another partner at the time of [the withdrawing partner's] disassociation or was such a client one year prior thereto", except a client initially brought to the firm by the departing partner.

The ABA reached a similar result under DR 2-108(A) in Informal Opinion 1417 (July 27, 1978). Finding an indirect restriction of the right to practice law, the Committee disapproved an agreement between law partners requiring a withdrawing partner to refrain for a stated period from hiring or otherwise associating with any associate employed by the firm at the time the partner departed.

As remarked, a number of court decisions, decided after the adoption of DR 2-108(A), have struck down restrictive agreements as contrary to public policy because they violated the Code. In *Dwyer v. Jung*, 336 A.2d 498 (N.J. Super. Ct. 1975), a partnership agreement designated certain clients as "belonging" to certain partners and restricted partners from representing another partner's clients for five years after withdrawal. The court stated: "A lawyer's clients are neither chattels, nor merely merchandise, and his practice and good will may not be offered for sale." Observing that such restrictive covenants injure the public by depriving clients of the lawyer of their choosing, the court ruled that a covenant, such as the one before it, that restricted a lawyer leaving a partnership from accepting employment or from "otherwise practicing his profession" violates DR 2-108(A) and is "void as against public policy".

The agreement involved in *In Re Silverberg*, 427 N.Y.S.2d 480 (App. Div. 1980), provided that, unless a client otherwise directed in writing, a partner could not represent another partner's clients for 18 months after the law firm terminated business. The court noted that lawyers should not "traffic" in clients and found that the arrangement transgressed DR 2-108(A) and public policy.

In *Gray v. Martin*, 663 P.2d 1285, 1290–91 (Or. 1983), the court considered a clause that eliminated payments a partner would receive upon withdrawal if the lawyer practiced law in any of three designated counties. This clause, the court held, violated the public policy that prohibits restrictions on an attorney's right to practice law.

Hagen v. O'Connell, Goyak & Hall, 983 P.2d 563 (Or. 1984), concerned an agreement that reduced the value of a departing lawyer's share in the firm by 40% if he refused to sign a commitment not to take firm clients with him when he left. The court determined that the 40% penalty provision was unenforceable since it was contrary to the public policy of making legal counsel available, insofar as possible, according to the wishes of clients.

The contract in *Attorney Grievance Commission v. Hyatt*, 490 A.2d 1224 (Md. 1985), prohibited lawyers leaving Hyatt Legal Services (1) from advertising in the mass media, (2) from setting up a legal clinic or "similar legal services organization," and (3) from any "direct or indirect contact" with the Hyatt clients formerly serviced by the departing lawyer. After the lower court found that the contract violated DR 2-108(A), the case was settled upon the parties' agreement to rewrite the contract to conform to the Code of Professional Responsibility.

In the main, the ABA and court opinions discussed above concerned direct prohibitions on representing clients, not mere limitations on solicitation—the principal subject matter of our Opinions 77 and 97 that allowed the restrictive covenants there involved. The ABA and court decisions, however, demonstrate a general hostility toward restrictive agreements and persuade this Committee that it should carefully examine any such agreements that come before it. We also take notice of the fact that the nature of the legal community and the rules governing its conduct are changing. The Washington bar has grown exponentially in recent years. Many out-of-town firms are opening branches in the city, and for this and other reasons many lawyers have left their old firms to form new associations. Moreover, the rules regarding advertising and solicitation now allow lawyers more freedom to seek and develop clients than was available in times past. While a law firm undoubtedly has a legitiate interest in maintaining its clients, we are hesitant to announce views that unduly restrict the ability of lawyers to change relationships in order to advance their careers, or that prevent or unduly hinder clients from obtaining legal representation from attorneys of their own choosing who may have formed new associations.

Whether judged by our prior opinions or by ABA and court pronouncements, the present Confidentiality Agreement must be considered grossly overreaching and improperly restrictive in violation of DR 2-108(A).[5] Our first difficulty is with the provision in the Confidentiality Agreement that, apparently for all time, prevents an employee from taking any action that would "interfere with the business of the firm in any way", including doing anything that would interfere with the firm's relationships with its clients or employees. This provision seems to forbid the sending out of new practice announcements, which, as our earlier opinions declare, cannot ethically be proscribed. Moreover, the Agreement appears to prevent a departed lawyer from responding to unsolicited questions about the possibility of representation from firm clients or from actually representing those clients if they asked the lawyer for assistance. DR 2-108(A) clearly condemns these types of restrictions.

Also unacceptable is the provision in the Agreement perpetually prohibiting any interference with the firm's relationships with its lawyer/employees. We believe that the conclusion in ABA Informal Opinion 1417 has particular relevance to the situation before us:

> [A] partner leaving his firm is bound by contract to avoid hiring or being otherwise associated with any associate employed by the firm at the time of such departure, for a period of five years.
>
> Although the agreement in question does not restrict the right of the individual lawyer to practice law directly, by restricting the right of association between attorneys it restricts such right indirectly and so falls within the prohibition of DR 2-108(A).

We also find too sweeping the provisions in the Agreement making a vast amount of materials perpetually confidential. These provisions, as we interpret them, would prohibit a lawyer from using (1) general

[4]Opinion 1072 overruled the Committee's statement in Informal Decision 521 (November 12, 1962), which indicated that restrictive covenants between partners—as opposed to restrictive covenants between the law firm and its employees—were permissible.

[5]We do not purport to deal with every aspect of the Agreement, but consider only those portions we find particularly unacceptable.

knowledge as to the practice of law that he gained at the firm, (2) documents prepared by the firm that have been publicly filed, (3) generally available information about firm clients, and (4) such other information as might be designated as confidential by the firm, regardless of its nature. The effect of these provisions is seriously to reduce a departed attorney's ability to practice law. While some restrictions as to the use of proprietary firm information are allowable, the restrictions here go far beyond the bounds of ethical propriety.[6] To the extent these provisions are intended to protect client secrets and confidences, they are not needed; the Code (DR 4-101) already does that.[7]

Our views are influenced by the truly oppressive liquidated damage clause found in the Agreement. The employee, if he violates the Agreement, is obligated to pay the firm $150,000; he also is subject to injunctive relief. The *in terrorem* effect of this sword of Damocles hanging over the head of a departing lawyer is not to be underestimated. This provision—as apparently was intended—would inhibit a lawyer from pursuing his or her profession in wholly legitimate ways.

Inquiry No. 86-10-41
AdoptedApril 21, 1987

Opinion No. 182

Attorneys Loaned to a Law Firm by a Lay Organization

• A law firm may borrow a lawyer from a lay organization and reimburse the lay organization for the salary the lawyer would otherwise receive for time spent with the law firm, but the lay organization engages in the unauthorized practice of law and the law firm assists in such unauthorized practice if the law firm pays the lay organization a fee for the borrowed lawyer's time that includes an element of profit. The law firm may bill its own clients for the services of the borrowed lawyer at ordinary reasonable rates without disclosing that the lawyer has been borrowed or that reimbursement has been provided to the lender.

Applicable Code Provisions

• **DR 3-101(A)** (Aiding Unauthorized Practice of Law)
• **DR 3-102** (Dividing Legal Fees with a Non-lawyer)
• **DR 3-103** (Forming a Partnership with a Non-lawyer)

Inquiry

The inquiry involves two related organizations. One of the organizations is a consulting firm which, among other professionals, employs lawyers. It is represented to us, and we accept for the purpose of this analysis, that the consulting firm's lawyers do not perform legal work on behalf of the consulting firm's clients.

The other organization is a law firm, some of the partners of which are also employees of the consulting firm. The lawyers who are both partners of the law firm and employees of the consulting firm perform legal work for the clients of the law firm. When acting in this capacity their time is billed to clients by the law firm and not by the consulting firm. In their dealings with clients and third parties related to their legal work, they use the letterhead of the law firm and in all other respects represent themselves to be and act as partners of the law firm. They in no respect act under the supervision and control of the consulting firm in performing legal work on behalf of the clients of the law firm. Their legal work is supervised by the law firm, and all applicable conflict of interest and confidentiality strictures are assumed to be applied to that work.

The inquiry relates to financial arrangements between the law firm and the consulting firm relating to the time spent by the lawyer/employees of the consulting firm in legal work performed as partners of the law firm on behalf of the law firm's clients. We are asked whether it is necessary that the partners of the law firm be removed from the payroll of the consulting firm during time spent acting as partners of the law firm (thus requiring what are represented to be complicated time allocation and other accounting problems) or whether they might stay on the consulting firm's payroll and be "rented" from the consulting firm for so much of their time as would be spent practicing law with the law firm. If they may be "rented," we are then asked whether the consulting firm must rent the lawyers to the law firm at cost or whether the consulting firm may include a profit margin in its charges to the law firm for time the consulting firm's lawyers spend practicing law.

Implicit in the inquiry is also the question of how the time of the lawyers loaned by the consulting firm to the law firm may be billed to clients of the law firm. The payments made by the law firm to the consulting firm would presumably be less than the fees charged by the law firm to its clients for the time spent by the consulting firm's employees practicing law. The lawyers who are partners of the law firm would share in the profits, if any, realized by the law firm on this and other work, in addition to receiving their full salaries from the consulting firm. The preference of the law firm would be for it to bill its normal and presumably reasonable time charges to its clients without differentiation between its rented partners and other partners who are not employees of the consulting firm. No disclosure would be made of the fact that some of the lawyers have been loaned to the law firm by the consulting firm or of the payments made to the consulting firm by the law firm.

Discussion

As expressed in our Opinion 146, the Committee has "recognized the benefits of making available professional services for which there is a market, consistent with the constraints imposd by the Code." In that opinion we concluded that the disciplinary rules do not prevent a lawyer from concurrently engaging in the practice of law

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[6] *Compare* this Committee's Opinion 175 (1986) (lawyer may, and perhaps must, use legal expertise and theories in subsequent representation developed during prior representation).

[7] In this regard, ABA Informal Opinion 1301 (March 25, 1975), states:

> The Code of Professional Responsibility specifically requires that a lawyer shall preserve and protect confidences and secrets of one who has employed him, in the interest of proper functioning of the legal system. While the avowed purpose of the restrictive covenant under consideration is to protect the confidences and secrets of the corporate employer [of the attorney], in the ordinary course there is no need or justification for further restriction to protect the corporate employer against unauthorized disclosure of confidences and secrets. Further restriction by the corporate employer limiting post-termination employment of the corporate lawyer denigrates the dignity of the profession and the attorney-client relationship.
>
> From an ethical standpoint it follows, that, with respect to a lawyer-employee, the avowed purpose of the restrictive covenant under consideration—protection of confidences and secrets—is already assured, given expected adherence to the Code of Professional Responsibility, and therefore the covenant appears superfluous. To further limit the lawyer's future employment, by contract, cannot be reconciled with his professional standing and position.

with a law firm and participating in a non-legal venture so long as steps necessary to prevent "improper lay involvement in the professional activities of lawyers" are taken. As we said in Opinion 146:

> So long as an [organization] composed of a lawyer and a non-lawyer does not render legal services, the joint enterprise does not violate the Disciplinary Rules. Similarly, the lawyer may open his own law practice to handle any legal work generated by the clients of the [lay organization] so long as the lawyer maintains the independence of his professional judgment and the confidentiality of his client's secrets and confidences.

Consistent with Opinion 146, it is clearly permissible in principle for lawyers to participate in the activities of the two types of organizations described in the inquiry so long as the consulting organization "does not render legal services" and the lawyers performing legal services for the law firm maintain the "independence of their professional judgment and the confidentiality of their client's secrets and confidences." Since that question has been settled in previous opinions, the only open questions relate to the financial arrangements between the two organizations and between the law firm and its clients as they relate to the time during which the lawyers practice law for the law firm.

In Opinion 146 the "lawyer's share of the proceeds from the [lay organization's] non-legal work [was] reduced by the amount of his legal fees," and we concluded that such an arrangement "does not result in a division of legal fees which the Code proscribes." By the same reasoning, we do not see any violation of the disciplinary rules arising from a procedure by which a lawyer's salary received from a consulting firm would be reduced in some portion because he devotes part of his time to the practice of law with a law firm. Moreover, we see no reason why an exact hourly reduction of his consulting firm salary need be made. So long as the lay organization receives no income from the practice of law, and the lawyer receives all of his compensation arising from the practice of law from the law firm, no "division of legal fees" prohibited by DR 3-102 or unauthorized practice of law prohibited by DR 3-101(A) occurs. DR 3-102 and DR 3-101(A) potentially come into play only if the consulting firm receives income from some source for time devoted by its employee to the practice of law.

Our only previous consideration of a lay organization's receipt of income from an employee/lawyer's time spent performing legal services for another organization appears in Opinion 94. In that opinion we concluded that a trade association could make its general counsel available to perform legal work on behalf of a related "educational council" and that the educational council could pay the trade association "a fee. . . that would compensate the Association" for the lawyer's time. There is no indication in the opinion that the educational council, in turn, provided legal services to anyone else or charged others for time spent by the borrowed lawyer practicing law on its behalf.

In Opinion 94, we reasoned that both DR 3-101 and DR 3-103 prohibit the "exploitation" by a lay organization of a lawyer's professional services and that "the offense is grounded upon [the lay organization's] being *in the business* of furnishing legal services." (Emphasis added.) We then found that "the facts presented [in Opinion 94] do not support a conclusion that the [trade] association [involved in that opinion] is in the business of practicing law" in making its general counsel available to the related educational council. We cited as supporting authority ABA Informal Opinion 973 (1967) in which the ABA concluded that no violation of DR 3-101 or DR 3-103 occurs when a corporation makes the services of its inside counsel available to the corporation's subsidiaries.

The facts presented by the present inquiry are significantly different in at least two repects. First, although the consulting firm and the law firm are related, the consulting firm and the law firm clients whom the consulting firm's "loaned" lawyers would represent are *not* related. Unlike the case of a trade association and related educational council or a parent corporation and its subsidiaries, the lawyer's employer and the clients of the law firm do not share a common purpose. Further, the educational council and corporate subsidiaries were assumed to use their borrowed lawyers on their own behalf, whereas the law firm intends to provide its borrowed lawyers' services to third parties for a fee.

In Opinion 94 we concluded that when a trade association makes its lawyer available to act as counsel to a related entity it is not engaged "in the business of furnishing legal services," even if reimbursed for the time involved. Nevertheless, we cannot reach the same conclusion where a consulting firm rents lawyers to a firm which will, in turn, hire those lawyers out to third parties at rates some part of which will be passed back to the consulting firm as "profit" on the time spent by its lawyer's practicing law for unrelated third parties. The consulting firm is in the "business" of providing professional services to its clients for fees that it hopes will return a profit to the consulting firm. When a consulting firm charges a fee containing a profit margin for the time of a lawyer it is no less engaged in its "business" than when it charges a fee containing a margin of profit for any other professional.[1]

Thus, we conclude that when a lay organization sells, loans or rents the time of lawyers to be engaged in the practice of law on behalf of clients unrelated to the lay organization at rates that are expected to return a profit to that organization, the lay organization is engaged in the unauthorized "business" of practicing law. Likewise, a law firm that would assist or participate in such a procedure would violate DR 3-101(A) by aiding in the unauthorized practice of the law. To the extent that some portion of the fees charged by the law firm contribute to rates charged by the consulting firm which include an element of profit, the law firm would also be engaged in a division of fees with a non-lawyer prohibited by DR 3-102.

The same considerations do not apply if the consulting firm is not seeking a profit on the rental of its lawyers. If, simply in order to avoid bookkeeping complications, the law firm were to reimburse the consulting firm to the extent of no more than a pass-through of the lawyer's salary plus fringe benefits (such as insurance premiums) and other costs directly attributable to its lawyer/employee's legal practice for the law firm (such as secretarial assistance, office space, word processing expense and the like), we do not find that the consulting firm would be engaged in the "business" of practicing law or that any prohibited division of legal fees would occur. That practice, in our view, would have the same economic consequences as taking the lawyer off the consulting firm's payroll during time spent performing legal services for the law firm, and we do not wish to create bookkeeping complications where there is no reason in principle to do so. If,

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[1]The fact that the consulting firm is engaged generally in the business of providing professional services for a profit also differentiates its activity from that of labor unions and nonprofit public service organizations of the type discussed in our recent Opinion 176. In that opinion we did not determine whether an organization that is generally nonprofit is engaged in the unauthorized practice of law in violation of DR 3-101(A) or improper fee-splitting in violation of DR 3-102(A) if it happens to realize a "profit" above its costs with respect to a particular case and does *not* deposit that profit in a separate legal assistance fund. We do not address that issue in this opinion, either.

however, the reimbursement provided by the law firm to the consulting firm were to go beyond a simple pass-through of expenses directly related to its lawyer/employee's law practice, by, for example, contributing to the general overhead attributable to the consulting firm's consulting work, a line would be crossed which would involve the consulting firm (and, by association, the law firm) in the business of "exploitation" of a lawyer's professional services and thereby in violation of DR 3-101 and DR 3-102.

Finally, we conclude that where a lawyer who performs legal services as a member of a law firm happens to be "borrowed" from another organization (whether on a salary reduction or reimbursement basis), there is no requirement that the fact of the "borrowing" or the fact or amount of "reimbursement," if any, provided to the lender be disclosed to the law firm's clients. It is presumed for purposes of this opinion that in performing legal work for their clients *all* law firm partners, including those borrowed from the consulting firm, act under the supervision and control of the law firm and that the law firm is responsible for all of the legal activities of all of its partners. Given the law firm's complete responsibility for the activities of its lawyers, it is under no obligation to disclose to clients what its lawyers do with the remainder of their time or what financial arrangements relate to them unless there is some specific reason arising from some other governing principle or applicable rule that requires that such disclosures be made. *See, e.g.*, DRs 4-101, 5-101, 5-105 and 5-107 (relating to preservation of confidences and secrets and conflicts of interest).

Inquiry No. 86-12-50
Adopted May 19, 1987

Opinion No. 183

Professional (Business) Cards

• A lawyer must indicate on professional cards the jurisdictional limitations of his or her license(s) to practice law if the attorney is not admitted to practice in the jurisdiction listed on the card.

Applicable Code Provisions

• **DR 2-102(A)** (A Lawyer Shall Not Use a Professional Card That Includes a False, Fraudulent, Misleading or Deceptive Statement or Claim)

• **DR 2-102(D)** (Jurisdictional Limitations of Practice of Law on Letterhead and In Other Permissible Listings)

Inquiry

The inquirer is employed by the Washington office of a law firm that has offices in several jurisdictions. Although she is a member of the bar in at least one jurisdiction in which the firm has an office, she is not yet a member of the District of Columbia Bar. The inquirer asks whether her business card, which lists only the Washington office and its address, must indicate that she is not a member of the District of Columbia Bar.

Discussion

DR 2-102(A) prohibits the use of a professional card if it includes a statement that is false, fraudulent, misleading or deceptive within the meaning of DR 2-101(B). Relevant to this inquiry is DR 2-101(B)(2) which provides that a false, fraudulent, misleading or deceptive statement is one that "[o]mits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading."

DR 2-102(D) expressly requires multijurisdictional law firms to make clear "on its letterhead and in other permissible listings" the "jurisdictional limitations" of the firm's lawyers who are not licensed to practice in all listed jurisdictions. The purpose of this Rule is to assure that the public is not misled. Consequently, when a lawyer's name appears on firm letterhead with a primary address in a jurisdiction in which the lawyer is not licensed to practice, an asterisk (or other symbol) and explanatory phrase are used to indicate this fact.

This same practice should apply to an attorney's professional card. The same risk of misleading the public about the lawyer's professional status exists when a lawyer distributes his or her professional card as when a letter is mailed on law firm letterhead. *See* EC 2-13. Both may fairly be read by the public as indicating that a lawyer is entitled to provide legal services in the jurisdiction(s) listed.

The ABA has interpreted DR 2-102(D) to mean that a business card listing more than one office on it should specify the lawyer's individual address at the firm and should make clear that the lawyer is licensed to practice only in the jurisdiction where his or her office is located. ABA Informal Opinion 1408 (1975). The present inquiry differs from the situation in Informal Opinion 1408 only in that the inquirer's business card lists only the law firm's Washington office where she works. The inquirer is not yet a member of this Bar. The risk of misleading the public regarding her present ability to practice law in this jurisdiction dictates that she indicate on her business card that she is not a member of this Bar or that she is a member only of the Bar of another jurisdiction.

Thus the Committee concludes that a professional card showing only a District of Columbia address is misleading when the lawyer whose name appears on the card is not a member of this jurisdiction's Bar and this fact is not disclosed on the card itself.

Inquiry No. 87-4-14
Adopted May 19, 1987

Opinion No. 184

Assessment of a Fee for Processing of Administrative Claims Under the D.C. No-Fault Act

• It is ethical to charge a reasonable fee for legal services related to the processing of an administrative claim for personal injury benefits under the D.C. No-Fault Act. The fee charged, however, cannot be illegal or clearly excessive and must be fully explained.

Applicable Code Provisions

• **DR 2-106(A)** (Proscription Against Illegal or Excessive Fees)

• **EC 2-19** (Fee Agreements Should be Fully Explained and Reduced to Writing)

Inquiry

The Inquirer is a law firm engaged in the practice of law in the District of Columbia and elsewhere.[1] In the course of representing potential plaintiffs in automobile negligence cases, the Inquirer provides assistance to its clients in the preparation and filing of applications for personal injury protection ("PIP") benefits under the District of Columbia Compulsory/No-Fault Motor Vehicle Insurance Act of 1982 (the "D.C. No-Fault Law" or "Act"), D.C. Code §§ 35-2101-2113 (1985 Supp.).

Ordinarily, the Inquirer does not enter into a fee agreement with such clients until after the PIP Application is processed and the circumstances of the accident ful-

[1]This opinion only analyzes the questions posed by this inquiry as they pertain to the D.C. Code of Professional Responsibility (the "Code").

ly explored. Usually, the Inquirer provides such services related to the PIP Application free of charge. The Inquirer provides such services to a class of clients who are not proficient in the English language. In the course of "representing" clients who are non-English speaking, additional administrative costs are incurred. The burden imposed by these administrative costs serves as the catalyst for this inquiry.

The inquiry questions whether the Code prohibits the assessment of a "nominal fee" for the services provided in connection with the processing of an uncontested PIP Application and if so the nature of the fee permitted. The fee which the Inquirer intends to charge is to be calculated by reference to "whatever monies have to be paid to the staff for the time spent in handling these matters."

Discussion

The Code of Professional Responsibility attempts to strike a balance between the interests of both the lawyer and client in the fee-setting process. On the one hand, the Code clearly recognizes that a lawyer is fully entitled to be compensated for legal services rendered. *See, e.g.*, Opinion No. 25. A lawyer's right to fair compensation preserves the integrity of the profession and assures the availability of legal services. EC 2-16. And, as noted by the Inquirer herein, the lack of compensation may deny legal services to a needy class of clients.

On the other hand, a lawyer may not charge or attempt to collect a fee which is either "illegal or clearly excessive." DR 2-106(A); *see also* EC 2-17 ("A lawyer should not charge more than a reasonable fee"). In the absence of illegality or excessiveness, as defined by DR 2-106(B), we can perceive no ethical prohibition to the assessment of a reasonable fee for the administrative processing of uncontested PIP claims under the D.C. No-Fault Act.

A fee is improper if it violates either a rule of law or a relevant disciplinary provision. DR 2-106(A). For example, DR 2-106(C) proscribes the use of a contingency fee in criminal cases. Similarly, we would consider the proposed fee here to be illegal if it were expressly forbidden by the D.C. No-Fault Law. Although this Committee does not attempt to resolve questions of law, resolution of this Inquiry requires us to examine the D.C. No-Fault Law. *See* Opinion No. 130.

As recently observed by our Circuit Court in *Diamond v. District of Columbia*:

> The 1982 No-Fault Insurance Act established a compulsory insurance system for personal injury in which victims of automobile accidents would be compensated irrespective of fault. In general, this system provided that accident victims should be paid by their own insurers rather than recovering from the insurance company of the person "at fault" for an accident. The 1982 Act required every owner of a motor vehicle registered or operated in the District of Columbia to carry insurance covering, among other things, the payment of "personal injury protection" benefits. Personal injury protection benefits provided compensation for medical and rehabilitation expenses, loss of income, and funeral costs incurred by any policyholder, passenger, pedestrian or other uninsured person injured in an automobile accident. These benefits were required to be "provided without regard to, and irrespective of, negligence, freedom from negligence, fault, or freedom from fault on the part of any person."

792 F.2d 169, 182 (D.C. Cir. 1986) (Citations omitted). As a corollary component of the Act, lawsuits seeking compensation for pain and suffering or other non-economic losses are prohibited except in few enumerated circumstances. D.C. Code § 35-2105 (1985 Supp.). The most significant of these exceptions authorizes a lawsuit only in cases where medical expenses exceed $5,000.

The benefits and restrictions created by the Act have survived constitutional challenge. *Diamond*, 792 F.2d at 185-187. Nevertheless, on March 8, 1985, the Council enacted several modifications to the Act. These modifications eliminate the $5,000 exception provision. *See* 1985 Amendments to D.C. No-Fault Law, D.C. Code § 2105 (1986 Supp.). The amendments, however, are not retroactive and all accidents prior to March 4, 1985 are governed by the initial provisions of the Act. *Diamond*, 792 F.2d at 185.

Pursuant to the Act, a person injured in an automobile accident is entitled to recoup PIP benefits which include the cost of medical care and lost wages incident to the accident. D.C. Code § 35-2106(e)(1). In order to recoup PIP benefits an eligible victim must submit a completed application form for PIP benefits ("Application") to the appropriate insurance carrier. Completion of an Application for PIP benefits generally consists of providing the insurance carrier with background information concerning the claimant, a description of injuries sustained and a statement of expenses or losses incurred. Unless the Application is disputed,[2] the legal services entailed are neither complex nor substantial.

As the Inquirer correctly points out, the D.C. No-Fault Law does not address the issue of whether attorney's fees can be assessed for the processing of a uncontested PIP Application. With respect to excessiveness, DR 2-106(B) states that:

> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> (3) The fee customarily charged in the locality for similar legal services.
> (4) The amount involved and the results obtained.
> (5) The time limitations imposed by the client or by the circumstances.
> (6) The nature and length of the professional relationship with the client.
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the service.
> (8) Whether the fee is fixed or contingent.

Accord EC 2-18.

In addition to the above-enumerated factors, we have also noted that a lawyer should fully consider *all* relevant facts and circumstances, including "the prospects of success at the outset." Opinion No. 42; *see also* Opinion No. 37. One such circumstance suggested by this inquiry is the statutory purposes of the Act itself. In this regard, it is noteworthy that the availability of attorney's fees related to claims under the non-insured motorist provisions of a related Act is expressly capped at $1,000. D.C. Code § 35-108(b).

As it is described in the inquiry, we do not perceive the fee arrangement contemplated to be either illegal or clearly excessive.

It appears, however, that the Inquirer does not ordinarily enter into a written agreement at the outset of representation. It is simply unwise to defer the preparation of a written agreement until the

[2]If there is a dispute, further investigation and/or litigation may be required. *See, e.g.*, *Johnson v. Collins*, No. 85-1946, 114 D.W.L.R. 497 (D.D.C. March 11, 1986), *Edmonas v. Stonewall Dixie Ins. Co.*, No. 6512-85, 114 D.W.L.R. 961 (D.C. Sup. Ct. May 12, 1986).

underlying matter is fully investigated. EC 2-19 merits quotation in its entirety:

> As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. *It is usually beneficial to reduce to writing the understanding when it is contingent.* A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason *he should explain fully to such persons the reasons for the particular fee arrangement he proposes.* (Emphasis added).

In order to avoid the possibility of confusion or duress, a fee arrangement should be made at the outset of the representation. *See* Opinion No. 11. The presence of a written agreement at the outset could serve to safeguard an attorney's right to compensation for investigative work, where further investigation suggests the unfeasibility of litigation. *See* Opinion No. 4.

It is the lawyer's obligation to assure "that there is not likelihood of misunderstanding as to fee arrangements." Opinion Nos. 29, 25. *See also* Opinion No. 166. Indeed, as we have observed, the presence of a "written agreement is an important step in accomplishing these goals." Opinion No. 103. Where, as here, communications between attorney and client may be deterred by language and/or cultural differences, the safeguards provided by a fully explained written agreement are particularly warranted.

Conclusion

A reasonable fee for the processing of an Application for PIP benefits is ethical. The attorney must be certain to explain fully any fee arrangement related to these services. A written fee agreement at the outset of representation is preferable.

Inquiry No. 86-9-35
Adopted June 16, 1987

Opinion No. 185

Billing for Disbursements

• A lawyer may not bill a client an amount as a "disbursement" that is greater than the sum disbursed.

Applicable Code Provisions

• **DR 1-102(A)(4)** (A Lawyer Shall Not Engage in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation)

• **DR 2-106** (A Lawyer Shall Not Charge a Clearly Excessive Fee)

Inquiry

It has come to our attention that in billing charges to clients for activities other than legal services, some lawyers and law firms apparently follow a practice of billing amounts attributable to activities of third parties as "disbursements" that are greater than the amounts they actually disburse to such third parties. For example, a firm may bill its clients at the rate a third party which provides services to the law firm ordinarily charges its customers even though the law firm, because of the volume of business performed, or for some other reason, receives a lower rate from the provider of those services. This practice suggests that we should clarify the application of the disciplinary rules to such billing practices.

Discussion

The disciplinary rules do not prevent a lawyer from billing for services or activities in addition to legal services. DR 3-102 prohibits dividing "legal fees" with non-lawyers, but the rules do not prohibit a lawyer or law firm from passing through disbursements made by the law firm in the service of its clients to the clients on whose behalf those disbursements were made. There is also nothing in the disciplinary rules that precludes a lawyer from billing for various support functions, such as duplicating, word processing and the like, or from realizing some return above its costs for those services, provided those charges are adequately identified and are not "clearly excessive" within the meaning of DR 2-106.

However, DR 1-102(A)(4) does require that a lawyer not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." That prohibition is, in turn, grounded on the admonition of Canon 1 that a lawyer "should assist in maintaining the integrity" of the profession. Both the admonition of Canon 1 and the prohibition of DR 1-102 have particular force in their application to dealings between a lawyer and his clients.

We express no opinion as to the definition of "dishonesty" or "misrepresentation" for purposes of statutory interpretation or as used in the law of torts. This opinion also has no direct application to charges billed to clients for services performed in-house. But, with respect to charges billed to clients for services performed by third parties, in our view DR 1-102(A)(4) requires that such third-party charges described as "disbursements" on a lawyer's bills to his clients be in amounts no greater than those actually "disbursed."

In this opinion we do not address reasonableness in amount. Rather, our opinion is based on the basic requirement embodied in DR 1-102(A)(4) that a lawyer be scrupulous in dealing honestly and forthrightly with members of the public—and particularly with his own clients. The word "disbursement" has a specific meaning, and the word is misused, and a client may reasonably be deceived, if amounts identified as "disbursements" are, in fact, greater than the amounts a lawyer has spent. When a lawyer bills a client for something, there should be no hidden meaning, and if a lawyer believes he is entitled to all or part of a cost saving realized by reason of his volume of business with a third party or his exceptional bargaining efforts, he should disclose that fact to his client. He should not keep that position hidden behind a term which in its ordinary meaning would reasonably lead a client to believe that it is asked to pay for third-party services in no greater amount than that actually paid out by its lawyer for such services.

Inquiry No. 86-12-50
Adopted June 16, 1987

Opinion No. 186

Disclosure of Client Confidences and Secrets

• A lawyer may not disclose to the public or the media information constituting confidences or secrets of his or her former corporate employer if the information was obtained in the course of an attorney-client relationship and the employer has indicated that it should be held inviolate or its disclosure would be embarassing or detrimental to the employer. A lawyer may, however, disclose such information to the Board of Directors or senior management of the corporation.

Applicable Code Provisions

• **DR 4-101(B)** (A Lawyer Shall Not Knowingly Reveal a Confidence or Secret of His Client Nor Use a Confidence or Secret of His Client to the Client's Disadvantage.)

• **DR 4-101(C)(3)** (A Lawyer May Reveal the Intention of His Client to Commit a Crime and the Information Necessary to Prevent the Crime.)

Inquiry

The Inquirer requests our opinion whether his client, a member of the District of Columbia Bar (hereafter "Attorney"), may disclose certain information obtained during the course of her former employment by a corporation. Although the employer did not consider that Attorney had been employed as a lawyer, she considered herself bound by the Code of Professional Responsibility.

During the course of the employment, Attorney came into possession of factual information concerning the operation of the corporation. This information was disseminated to her and simultaneously shared with other attorney and non-attorney employees of the corporation. Some of the information was also disseminated outside of the corporation. There were and remain differences of opinion at senior levels within the corporation as to how issues involving the information should be handled. The information in question does not involve pending litigation but rather involves matters of public safety, economics and other public policy concerns.

Attorney now contemplates various possible courses of conduct during which she may come to disclose the information.

Discussion

The relevant provision of the Code is DR 4-101(B) which provides that a lawyer shall not knowingly reveal a confidence or secret of his client nor use a confidence or secret of his client to the client's disadvantage. The Legal Ethics Committee recently considered the scope of DR 4-101(B) in Opinion 180. As set forth in that Opinion, the issues with respect to the possible disclosure by Attorney of her employer's information are as follows.

1. *Attorney-Client Relationship.* "The duty to preserve the confidences and secrets of a client is grounded in the existence of the attorney/client relationship." Opinion 99. The Committee cannot determine on the basis of the very limited facts presented in the Inquiry whether an attorney/client relationship existed between Attorney and her former employer. The fact that the corporation has stated in open court that Attorney was not hired to be its lawyer, as alleged in the Inquiry, is highly probative but not dispositive of this question. It is still possible that the corporation's disclosure of the information to Attorney was based on an expectation that an attorney/client relationship existed as to the particular matter.

The Committee has previously held in Opinion 99 that even if the existence of an attorney/client relationship is problematic, the prohibitions of DR 4-101 are applicable so long as there is a "colorable basis" that the statements were made in the course of an attorney/client relationship:

> . . . if there is a colorable basis for asserting that the statements were made in the course of an attorney/client relationship, the lawyer must resolve the question in favor of the existence of that relationship and in favor of preserving the confidentiality of the disclosures. This colorable basis standard obtains even when . . . the lawyer's personal view is that the attorney/client relationship either never existed or was terminated prior to the disclosure at issue.

If an attorney/client relationship did exist, the Committee has ruled on many occasions that the duty not to disclose confidences and secrets continues after the relationship has ended. *E.g.*, Opinions 14, 99, 124, 175, 180.

2. *Confidences and Secrets.* Client "confidences" and "secrets" are defined by DR 4-101(A) as follows:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

EC 4-4 states that the ethical precept to preserve the "confidences" and "secrets" of a client is intended to be broader than the evidentiary privilege against disclosure of attorney-client communications. The Committee has accordingly ruled that whether or not information is privileged is not dispositive in determining the scope of the attorney's duty under the Code, and that, unlike the evidentiary privilege, information classified as a secret does not lose that classification because of the nature or source of the information, or the fact that others may be aware of it. Opinion 83. Thus, the fact that the information in Attorney's possession was disseminated within the corporation and to persons outside of the corporation does not mean that the information is not a secret under DR 4-101(A) if the information was "gained in the professional relationship" and the corporation has indicated that it should be held inviolate or its disclosure would be embarrassing or detrimental to the corporation.[1]

3. *Permissible Disclosure.* Assuming that an attorney-client relationship existed between Attorney and her employer, and assuming further that the information received by Attorney constitutes "confidences or secrets" of the employer, disclosure to the media or the public would be absolutely prohibited. Also, disclosure to governmental authorities would be prohibited unless disclosure is necessary to prevent an ongoing or future crime and then only to the extent that disclosure is necessary to prevent the crime. DR 4-101(C)(3); Opinion 180.

The Legal Ethics Committee has not previously considered whether an attorney's obligation of confidentiality prevents disclosure of confidences or secrets to a corporate client's senior management or to its Board of Directors. The Committee on Ethics and Professional Responsibility of the American Bar Association has held that an attorney may disclose confidences and secrets to the Board of Directors of his or her corporate client without violating the Code of Professional Responsibility. *See*, Informal Opinion 1349; *see also*, Formal Opinion 202 (construing Canon 37 of the Canons of Ethics).

In its Opinion 148, our Committee relied on Formal Opinion 202 in addressing the ethical issue raised when an attorney employed by a government agency discovers, in the course of giving legal advice to or representing an employee of the agency in his or her official capacity, that the employee has committed or intends to commit a wrongful act or fraud which may materially injure the agency. The Committee held that the attorney may, indeed must, make disclosure of the employee's conduct to the appropriate persons in agency management. Opinion 148 was based on the reasoning that a government attorney's client is the agency and not any individual employee of the agency. The same reasoning is applicable here—assuming a lawyer/client relationship existed, it

[1]In Opinion 106, the Committee defined client secrets as "information unavailable to the general public, the disclosure of which could embarrass or adversely affect the interests of the agency." The Committee did not thereby mean to infer that information that has been disclosed to the public is never protected by DR 4-101(B). The degree of public disclosure may be relevant in determining whether disclosure by the attorney would be embarrassing or detrimental to the client. If the client has requested that the information be held inviolate, however, the extent of prior public disclosure is not relevant.

is the corporation who is the client, *see* EC 5-18, and disclosure of secrets and confidences to senior management of the client or the corporation's Board of Directors is permissible.

Inquiry No. 87-4-13
Adopted October 20, 1987

Opinion No. 187

Representation Of Client In Challenging Agency Rules For Which Attorney Was Responsible While In Government

• A former government attorney is not automatically prohibited from representing a private client in challenging an agency's regulations for which he had been responsible while he was employed in Government, provided that he divulges no confidences or secrets of his former agency. The attorney also must assess whether his/her previous responsibility for the rule will affect the exercise of his/her independent professional judgment and, if so, the attorney must seek his/her current employer's consent to the representation.

Applicable Code Provisions

• **DR 4-101** (Preservation of Confidences and Secrets of a Client)
• **DR 5-101** (Refusing Employment If the Lawyer's Personal Interests May Affect His Independent Professional Judgment)
• **DR 5-105** (Refusing Employment If the Interests of Another Client May Impair the Independent Professional Judgment of the Attorney)
• **DR 9-101(B)** (Private Employment in a Matter in Which the Lawyer Personally and Substantially Participated While a Public Employee)

Inquiry

The inquirer was formerly employed by a government agency as a staff attorney primarily responsible for determining the applicability of various requirements of a federal act (the Act) to a particular industry in the United States. His duties included drafting memoranda and regulations of general applicability under the Act without focusing on specific parties or cases.

The inquirer has left the agency for employment with a non-profit public interest organization (employer). The employer would like him to assist it in developing comments to regulations which the inquirer's former agency proposes for applying the Act's requirements to the industry. He would be expected to suggest regulations and make other recommendations on behalf of his employer for adoption by his former government agency. His employer would want him to work on any future litigation arising from the agency's regulatory activities in applying the Act to the industry.

The inquirer asks for the Committee's views on the propriety of these activities for his present employer in light of his previous duties at the government agency.

Discussion

The inquirer comes to this Committee by reason of his former agency ethics official's suggestion to seek our advice in light of our Opinion No. 106.[1] That opinion discussed the propriety of a former government attorney's representation of a private client in challenging the validity of a rule for which the attorney had substantial responsibility in its promulgation. The Opinion concluded that DR 9-101(B), and the rulemaking exception that has been carved into the rule, would not prohibit the attorney's representation in subsequent employment. However, the Opinion cautioned the attorney that he "would run a serious risk" of violating DR 5-105 and DR 4-101 by undertaking this representation.

We believe that Opinion No. 106 applies equally to the present inquiry since the inquirer's previous government employment was in a rulemaking capacity. DR 9-101(B) has been interpreted to exclude rulemaking from the scope of "matters" encompassed by the rule and thereby from the scope of the conflict-of-interest restrictions imposed upon former public employees by this rule.[2] Thus, as we stated in Opinion No. 106, "attorneys who were involved in rulemaking while employed by the government are not automatically precluded from accepting private employment in connection with such rulemaking." This includes challenging the validity of rules that an attorney personally and substantially participated in drafting while a public employee.

This is not to say that other disciplinary rules do not apply to a lawyer who moves from a rulemaking position with the government to a position with a private employer. The requirement of DR 4-101(B) not to reveal a client's confidences or secrets remains with the former government attorney as does the requirement of DR 5-101(A) that a lawyer not accept employment if the exercise of his professional judgment may be affected by his own personal interests.[3]

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[1] The agency's designated ethics official, to whom the inquirer initially referred this question, advised him that his activities for his current employer would not violate the prohibitions of the Ethics in Government Act, 18 U.S.C., Section 201 *et seq.*, since his work at the agency involved general rulemaking. Rulemaking is exluded fromt the scope of the Act's prohibitions at 18 U.S.C., Section 207. Specifically, the ethics official advised the inquirer that "there is no statutory or other restriciton against your participating in proceedings which are governed by rules which you helped to make." The Committee does not express any opinion on the agency's interpretation of these statutory provisions. *See* Committee Rule C-5.

[2] DR 9-101(B) states:

> A lawyer shall not at any time accept private employment in connection with any matter in which he or she participated personally and substantially as a public officer or employee, which includes acting on the merits of a matter in a judicial capacity.

[3] Opinion No. 106 also applied DR 5-105 to the attorney's move from public to private employment, a successive representation situation. However, DR 5-105 by its terms, applies only to simultaneous multiple representation. *See* Opinion No. 175. *See also* Opinion No. 163. Thus, the DR 5-105 analysis that was made in Opinion No. 106 and its predecessor opinions (Nos. 84, 78 & 71) was in error, as was the application of the substantial relationship test under DR 5-105. This test asks whether "matters" are the same or are substantially related for purposes of determing whether confidences or secrets were learned during a lawyer's previous employment. It is derived from DR 4-101(B), not DR 5-105. *See Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 224 (7th Cir. 1978); Opinions Nos. 164 & 158. The District of Columbia Court of Appeals also discussed the Cannon Four origins of the substantial relationship test in *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 (D.C. 1984), a case that was decided after the Committe adopted Opinion No. 106.

DR 9-101(B) also ordinarily applies the substantial rleationship test to the situation where a government attorney has moved to private practice. *Id.* at 48. However, here the inquirer's position with the government was solely in a rulemaking capacity. Presuming the Court of Appeals would apply the rulemaking exception that has been carved into DR 9-101(B), neither the rule nor the substantial relationship test is applicable in this instance. *See* ABA Formal Opinion No. 342 (1975). *See also Laker Airways Ltd. v. Pan Am. World Airways*, 103 F.R.D. 22, 34 (D.C.C. 1984).

However, it would be inconsistent with the policy reflected in the DR 9-101(B) rulemaking exception to apply the substantial relationship test under DR 4-101(B) to the situation where an attorney moves from government service to private representation when it cannot be applied under DR 9-101(B). The same rationale for excluding rulemaking from the scope of "matter" under DR 9-101(B) supports its exclusion from being considered a "matter" under the substantial relationship test inferred form DR 4-101(B).

We note that although DR 5-105 was erroneously applied in Opinions Nos. 106, 84,78 & 71, the result in each opinion is not affected.

Concerning the inquirer's Canon 4 obligations, the Committee's discussion of this issue in Opinion No. 106 is applicable to the present inquiry as well. To summarize, Opinion No. 106 observed that a former government attorney who personally and substantially participated in drafting agency rules was likely to have gained client confidences and secrets that are protected from disclosure by DR 4-101(B). An attorney who possesses such information and who is asked to challenge the agency's rules may be caught in an ethical dilemma. In order to represent his current employer zealously, the attorney may need to use this information. However, DR 4-101(B)(3) expressly prohibits an attorney from using a client's confidences or secrets to the advantage of a third person. This obligation outlives the employment relationship and thus protects a former client's confidences and secrets from unauthorized disclosure. Opinion No. 175.

Consequently, an attorney who finds himself in this position must either seek the agency's consent to reveal the confidences and secrets he previously learned or determine that he can zealously represent his current employer while at the same time protecting the agency's confidences and secrets.[4] The latter course may well prove impossible.

Finally, an attorney who drafted agency rules that are challenged by a subsequent employer must carefully assess whether his previous involvement with the rules would affect the exercise of his professional judgement on behalf of his employer. DR 5-101(A) provides that a lawyer must decline employment if his representation of a client "will be or reasonably may be" affected by his personal interests. While the subsequent employer can consent to the inquirer's representation upon full disclosure, if that employer expresses concern about the inquirer's ability to represent it appropriately, the inquirer should carefully consider this expression in determining whether in light of DR 5-101 he can undertake the second representation. *See* Opinion No. 169.

[4] Opinion No. 106 intimated that an agency could not consent to the disclosure of its confidences or secrets where a lawyer intends to use such information to the agency's disadvantages. Whether an officer or employee of a public agency may consent to the disclosure of any confidence or secret without limitation as to its intended use is likely a legal issue; but DR 4-101(C)(1) would not preclude such consent.

Inquiry No. 86-10-42
Adopted: November 17,1987

Opinion No. 188

Newspaper Advertisements

• A lawyer may not engage in false or misleading advertising. In addition, a lawyer normally may not accept employment resulting from an advertisement that the lawyer learns has materially misled the public even if he or she was unaware of the false or misleading aspect of the advertisement at the time that it was published. DR 2-101; DR 2-104.

• The statement in a law firm's newspaper advertisement that "thousands of successful claims" have been brought against the manufacturer of a particular devise is not false or misleading if that fact is true and members of the public understand that a case-by-case assessment of the success of such claims in the future must be made. DR 2-101.

• Nor does the advertisement run afoul of the prohibition in DR 2-101(C)(1) against the use of statistical data or other information based on past performance or prediction of future success. That disciplinary rule refers to the past performance of a particular lawyer and the prediction of his or her future success rather than to the past results or likelihood of success of a particular type of claim.

Applicable Code Provisions

• **DR 2-101**(Publicity and Advertising)

• **DR 2-104** (Suggestion of Need of Legal Services)

Inquiry

The Committee regularly receives inquiries whether a particular advertisement by a lawyer violates the restrictions in the District of Columbia Code of Professional Responsibility on attorney advertising. In this case, the Committee has been asked about a newspaper advertisement stating that "[t]housands of successful claims have been brought against the manufacturer" of a particular device and offering to discuss the matter with members of the public who believe that they have been injured by use of the device.

Discussion

This inquiry arises primarily under DR 2-101, which states in relevant part:

(A) A lawyer shall not knowingly make any representation about his or her ability, background, or experience or that of the lawyer's partner or associate, or about the fee or any other aspect of a proposed professional engagement, that is false, fraudulent, misleading, or deceptive, and that might reasonably be expected to induce reliance by a member of the public.

(B) Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:

(1)Contains a material misrepresentation of fact;

(2)Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;

(3)Is intended or is likely to create an unjustified expectation;

. . .

(6)Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings of disclaimers necessary to make a representation or implication not deceptive.

(C) A lawyer shall not, on his or her own behalf, or on behalf of a partner or associate, or any other lawyer affiliated with the firm, use or participate in the use of any form of public communication which:

(1)Contains statistical data or other information based on past performance or prediction of future success;

(2)Contains a testimonial about or endorsement of a lawyer;

(3)Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public;

(4) Is intended or is likely to attract clients by use of showmanship or self-laudation.

The inquiry also implicates DR 2-104, which provides:

(A)A lawyer who has given unsolicited advice to a layperson that he or she should obtain counsel or take legal action shall not accept employment resulting from that advice if:

(1)The advice embodies or implies a statement or claim that is false, fraudulent, misleading, or

deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C); or

(2)The advice involves the use by the lawyer of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overreaching, or vexatious or harassing conduct.

Deceptive Statements -- In General

These disciplinary rules recognize that it is in the public interest "to educate laypersons to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." EC 2-1. Advertising by lawyers, of course, can promote each of these objectives. The disciplinary rules, accordingly, permit members of the bar considerable leeway in advertising the availability of their services.

At the same time, the disciplinary rules regulate advertising to prevent abuse, particularly the dissemination of false or misleading information. As EC 2-8A states, "[t]he public benefit derived from advertising depends upon the usefulness of the information provided to the community...". Obviously, false or misleading information is not useful and, on the contrary, disserves the public. As a result, the central limitation on advertising contained in DR 2-101 is the prohibition on the use of "false, fraudulent, misleading, or deceptive" statements. DR 2-101(A).

More particularly, DR 2-101(A) prohibits a lawyer from "knowingly" making any deceptive statement about "any ... aspect of a proposed professional engagement." We do not interpret this language to restrict the bar only to the use in advertisements of simple, easily verified facts. Compliance with DR 2-101(A) depends upon whether the statements made are truthful, not upon whether they are easily proven to be true. Indeed, dissemination of accurate information that is not widely known or easily accessible may serve the public interest more than reiteration of information that already is current in the population at large. The fact that it might be difficult or expensive to confirm the accuracy of a particular statement, therefore, is irrelevant. *Cf.* Opinion 142 at n.9.

On the other hand, there must be a reasonable basis for each statement in any advertisement by a lawyer. DR 2-101(A) proscribes the "knowing" use of deceptive statements that might reasonably be expected to induce reliance by the public. We read this to include advertisements issued in reckless disregard of their truth.

Furthermore, because an advertisement by a lawyer constitutes "unsolicited advice to a layperson that he or she should obtain counsel or take legal action" within the meaning of DR 2-104, a lawyer may not accept employment resulting from an advertisement that embodies a deceptive statement even if the lawyer in good faith was unaware of that at the time the advertisement was published. As a result, if it becomes apparent from persons answering the advertisement or otherwise that the advertisement was materially false or misleading, the lawyer not only must discontinue use of the advertisement, but also must refuse employment resulting from it.[1]

Deceptive Statements--Creating an Unjustified Expectation

An advertisement stating that "[t]housands of successful claims" have been brought against a particular manufacturer would be misleading if that statement is false or if it leads laypersons to believe that claimants have recovered exactly the amounts they have demanded or that similar claims in the future necessarily will succeed in some sense, too. "Not only must commercial publicity be truthful but its accurate meaning must be apparent to the layperson with no legal background." EC 2-8B. *See also* EC 2-10. Moreover, DR 2-101(B) specifically defines as deceptive not only a statement that is false, but also a statement that "[i]s intended or is likely to create an unjustified expectation." *See also* DR 2-104(A)(1) (prohibiting employment resulting from advice that "involves...unwarranted promises of benefits"). As explained in EC 2-8B.

> "Advertising and other communications should make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually.... Commercial publicity and public communications addressed to undertaking any legal action... should disclose the impossibility of assuring any particular result."

See also EC 2-9 ("public communications that would produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers would be harmful to society").

However, an advertisement reporting the results of a category of prior claims is not inherently misleading if it details those results accurately and in a manner that will allow members of the public to understand that a case-by-case assessment of the success of such claims in the future must be made. EC 2-8B suggests that "commercial publicity conveying information as to results previously achieved...or expected outcomes" always is deceptive "[b]ecause of the individuality of each legal problem...." However, an expansive application of DR 2-101 would be incompatible with the recognition by the authors of the rule that it is desirable to "afford the public access to information relevant to legal rights." EC 2-9. Publication of the widespread success of types of claims seems consistent with that goal. Suppression of those facts does not. Furthermore, there is no reason why that kind of information cannot be disseminated in a correct and nonmisleading fashion. Certainly if the advertisement contains an express warning that the viability of any particular claim must be assessed on its individual facts, no one can be misled.

Past Performance or Prediction of Future Success

Apart from the prohibition in DR 2-101(A) and (B) against the use of deceptive advertisements, DR 2-101 (C)(1) forbids any public communications "[c]ontain[ing] statistical data or other information based on past performance or prediction of future success." Although EC 2-8B states that this information "is deceptive because it ignores important variables," we believe that DR 2-101(C)(1) does not refer to the past results or likelihood of success of categories of claims, but rather to the individual lawyer's past performance and the prediction of his or her future success. Under this view, the disciplinary rule does not apply to the advertisement at issue here.

DR 2-101(C) generally is directed at public statements to the effect that the lawyer making the statement performs

[1] Conceivably, there may be circumstances in which employment by persons responding to the advertisement nonetheless might not "result from" it, and hence might be permissible, because of intervening causes, such as in-person consultation with the attorney, correction of the misimpression created by the advertisement, and insistence by the potential client on retention of that particular lawyer. The committee does not address that question in this opinion.

well or will be successful in comparison to other lawyers. The rule, for example, forbids use of testimonials or endorsements of a lawyer, representations about the quality of legal services that the public cannot reasonably verify, statements intended to attract clients by use of self-laudation, and so forth. DR 2-101(C)(1) should be interpreted similarly to refer to information regarding the past performance or likelihood of future success of the lawyer involved as distinguished from other lawyers. Since "past performance" refers more naturally to an individual's efforts than to the results achieved in prior cases regardless of the lawyer involved, the use of that term in DR 2-101(C)(1) bolsters this conclusion.

Furthermore, since advertisements, like the one here, can be written with numerical references to prior claims without making the advertisements inherently false or misleading, it is difficult to see how reading DR 2-101(C)(1) broadly to encompass such advertisements would serve a valid purpose. Again, an expansive application of the provision would undermine the objective "of affording the public access to information relevant to legal rights." EC 2-9.

In this case, the advertisement does not assert or imply that any particular attorney has had or is likely in the future to have a particular rate of success. Nor does the advertisement make any reference to the quality of legal services provided. It merely states that many claims of a certain type have been resolved in favor of the persons asserting them, without regard to the identity of the particular lawyer or lawyers involved. DR 2-101(C) does not apply to this type of statement.

Dissenting Opinion of One Member

The advertisement is a clear violation of DR 2-101(C)(1), a prophylactic rule designed to protect the public. That provision explicitly bans advertisements that "contain statistical data or other information based on past performance." Unlike other subsections of DR 2-101(C), it is not limited in terms to data or information pertaining to a particular lawyer. The committee in a *tour de force* announces that hereafter it is. Whether or not the rule is wise, it is not our function to construe it away.

Inquiry No. 84-8-26
December 15, 1987

Formal Opinion No. 189

Name of Law Firm With One Attorney; Public Representations Regarding Non-Resident Attorney

• Advertising, a law firm's name, or a firm's use of its name, runs afoul of the Disciplinary Rules if not factually accurate. Thus, the use of the name "John Doe and Associates, P.C." by an attorney who presently has no associates is contrary to the Disciplinary Rules unless John Doe normally employs two or more associate attorneys; but advertisements by a two-partner law firm that feature only Partner "B," and the use by the firm of either the name "Law Offices of B" or "Law Offices of A and B," are not inherently contrary to the Disciplinary Rules merely because Partner "B" is rarely or never in the jurisdiction. Assuming factual accuracy, the determination as to whether the Disciplinary Rules are violated depends upon several factors, and it will ultimately depend largely upon whether the law firm receives any indication that any of these practices may be misleading, and if so, whether the law firm responds accordingly.

Applicable Code Provisions

- **DR 2-101 (B)**(Representations that are likely to deceive)
- **DR 2-102** (Professional notices)
- **EC 2-8B; 2-10; 2-11**

The Inquiries

This is a response to two inquiries in which the issues presented are very similar. The first inquiry is from an attorney who asks whether his use of the name "John Doe and Associates, P.C." runs afoul of the Disciplinary Rules if he presently employs no associate attorneys; and if so, whether the problem would be remedied by the addition on his letterhead of the qualifier that he "Associates with independent attorneys and counselors at law," which he sometimes does.

The second inquiry is from an attorney in a two-partner firm who is licensed to practice law in the District of Columbia (Partner "A"). The firm's advertising on television will feature only its Partner "B," another attorney who is licensed to practice law in the District of Columbia, but Partner "B" resides and practices in another jurisdiction and will rarely be in the District of Columbia office. The inquirer asks whether it is permissible to advertise on television in the District of Columbia featuring only non-resident Partner "B," and to use either the name "Law Offices of B" or "Law Offices of A and B" in its District of Columbia office.

Discussion

The issue presented is whether the inquirers may be deceiving the public by their representations on the shingle, letterhead, calling cards, advertising, and the like. The inquirers present no other specifics about the advertising or other public representations, and the Committee expresses no opinion about the permissibility under the Disciplinary Rules of any aspects of the advertising or public representations other than those that are specifically discussed here.

The Applicable Disciplinary Rules

With respect to the name of the firm, DR 2-102 (B) provides, in pertinent part:

> A lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading or deceptive within the meaning of DR 2-101(B), or is contrary to law.

Similarly, DR 2-102(A) provides, in pertinent part:

> A lawyer or law firm shall not use or participate in the use of a professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing or similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading or deceptive within the meaning of DR 2-101(B) ...

DR 2-101(B) provides, in turn, that a representation is false, fraudulent, misleading, or deceptive if it includes a statement or claim which, among other things:

> (1) Contains a material misrepresentation of fact;
>
> (2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
>
> (3) Is intended or is likely to create an unjustified expectation;...or
>
> (6) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

The Ethical Considerations that are relevant to the permissibility of a law firm name include EC 2-11, which

provides, in pertinent part:

> The name under which a lawyer conducts his or her practice may be a factor in the selection process. The use of a name which could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder is not proper.

Also relevant is EC 2-10, which provides, in pertinent part:

> The Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding falsity, deception and misrepresentation.

Finally, EC 2-8B provides, in pertinent part:

> Not only must commercial publicity be truthful but its accurate meaning must be apparent to the layperson with no legal background.

Analysis

A. Factual Inaccuracies

The use by a law firm of a statement that is factually inaccurate in its advertising, its name, or its use of the name normally constitutes intentional deception and would, of course, run afoul of DR 2-101(B)(3) and DR 2-102(A) and (B). Thus, for example, if the attorney who does not *now* have any associate attorneys[1] also does not *normally* employ two or more[2] associate attorneys, the name "John Doe and Associates " -- which suggests by its terms that John Doe has associate attorneys who are employed by him -- is factually inaccurate and therefore impermissible under DR 2-101(B)(3) and DR 2-102(A) and (B).

The addition to the letterhead of the qualifier that John Doe "Associates with independent attorneys and counselors at law" would not remedy the problem because the word "Associates" appears as a noun in the name, but as a verb in the qualifier, and there is thus no logical connection between the two.[3] Thus, the verb "Associates" in the qualifier does not limit the noun "Associates" in the name; instead, the name still suggests that there are associates *within* the firm, and the qualifier would appear to be *expansive* -- suggesting that the firm, *along with* its associate attorneys, occasionally works in conjunction with independent attorneys.

B. The Factors

If John Doe normally employs two or more associate attorneys but, in the usual turnover of employed attorneys, he occasionally has less than two associate attorneys for periods of time, the Committee cannot opine in the abstract as to whether the reference to "and Associates" in the name of the firm may be misleading; instead, the Committee can only state that the name would not be *inherently* contrary to the Disciplinary Rules.

By the same token, the Committee cannot opine in the abstract, based upon the facts presented in the inquiry, whether featuring only Partner "B" in the television advertising, or whether either proposed name -- "Law Offices of B" or "Law Offices of A and B" -- may be misleading. Including the name of a nonresident partner in the law firm name is accepted in many contexts, as reflected by the use of the name of a deceased partner (generally permitted by DR 2-101(B)), or the use of the same firm name in several cities (generally permitted by DR 2-102(D) and the Committee's Opinions No. 34 and 87). Thus, assuming that the partnership is *bona fide* for this purpose,[4] and assuming that the responsibility or status of the attorneys is accurately represented (as required by DR 2-102(B)), none of these practices, as described in the inquiry, is *inherently* contrary to the Disciplinary Rules.

If these practices are not inherently contrary to the Disciplinary Rules, the issue of whether any of the practices may nonetheless run afoul of the Disciplinary Rules depends upon, among other factors, the nature of the actual and potential clientele; the nature of the firm's law practice; the information that is provided to clients and prospective clients regarding the makeup of the law firm, how it handles cases, and the responsibility and status of those in the firm; the reasonable expectations generated by the advertising, the name, and the law firm's use of the name; and whether the firm's actual and potential clientele cares about whether the firm has associates, or cares about whether Partner "B" is present. In addition, for the attorney without associates who refers to "associates" in the name, the issue depends upon the frequency and duration of the firm's time without two or more associate attorneys, as well as the extent of the efforts made by the firm to employ associate attorneys when it does not have at least two.

C. Reaction to Complaints

If the firm receives legitimate indications that any of these practices is misleading, the firm must, in order not to run afoul of DR 2-101(B) and 2-102(A) and (B), take steps to remedy the problem in its representations to the public and with respect to any legitimate misunderstandings of actual and prospective clients.

Inquiry No. 85-10-39
Inquiry No. 86-5-20
February 16, 1988

Opinion No. 190

Propriety Of Inclusion Of A Provision In A Retainer Agreement Requiring Arbitration

• A lawyer is not prohibited from including in a retainer agreement a provision requiring arbitration of the claims of the attorney or the client, including potential claims by the client for legal malpractice or professional negligence. Numerous questions and risks of possible violations of the Code are raised by such a practice, however, to which the attorney must give serious attention.

Applicable Code Provisions

• **DR 2-106** A lawyer shall not charge an excessive fee

• **EC 2-23** A lawyer should be zealous in avoiding controversies over fees with clients

• **DR 2-110 (C)(1)(F)** A lawyer may withdraw if client deliberately disregards an obligation as to expenses or fees.

• **DR 6-102** A lawyer shall not attempt to exonerate himself from or limit

[1] Non-attorneys do not count for this purpose because the word "associate" in this context normally refers to an attorney.

[2] Normally employing only *one* associate attorney does not eliminate the factual inaccuracy because the name refers to "Associates"--plural.

[3] Unless John Doe normally associates with independent attorneys, of course, the qualifier would also be factually inaccurate and its use would constitute intentional deception.

[4] Not all partnerships that are *bona fide* as a matter of law--valid and binding partnerships under applicable state law--are also *bona fide* for purposes of the DIsciplinary Rules. If, for example, a partnership were created for the purpose of misleading the public, it would not be a *bona fide* partnership for the purposes of the Disciplinary Rules (See Committee Opinion No. 109) even if it were a valid and binding *de jure* partnership under state law.

his liability to his client for malpractice.

• **DR 2-101 (A)** A lawyer shall not make any false, fraudulent, misleading or deceptive representation about any aspect of a proposed professional engagement.

Inquiry

The inquirer asks whether an attorney may include a provision in "a written fee agreement" that requires arbitration of all claims by either the attorney or the client under the agreement, including any claim of legal malpractice or professional negligence asserted by the client. The inquiry assumes that the provision would provide for use of the rules of the American Arbitration Association or any available arbitration mechanism of the District of Columbia Bar.

The inquiry refers to the recent Supreme Court decision, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 200 (1987), in which the Court held that a provision in a broker-customer agreement providing for arbitration of any controversy arising out of the relationship would be enforced even as to the customer's claims under the Securities Exchange Act of 1934 and the RICO statute.

Discussion

In general, the Committee is of the view that a contract between a lawyer and the client providing for arbitration as to fees should be encouraged; among other things, arbitration may reduce the intensity of any controversy between the client and the attorney with respect to fees, should it develop.[1] This would perhaps assist the attorney in meeting the obligation, referred to in EC 2-23, of avoiding controversies over fees with clients.[2]

Punitive damages may be awarded in an action against an attorney for professional malpractice. On the other hand, arbitration awards generally do not include an award of punitive damages. The Committee believes, however, that an agreement to arbitrate malpractice claims cannot limit or prevent the award of punitive damages, nor can an attorney ethically so argue in any subsequent arbitration proceeding. To do so would violate DR 6-102, which precludes an attorney from attempting to exonerate himself from or limit his liability to his client for malpractice.

A provision affecting the client's ability to assert a claim in court for professional malpractice obviously is only remotely related to the matter of the fees. Accordingly, if a fee or retainer agreement undertakes to limit a client's malpractice claims and his/her ability to sue in court upon them, the attorney should take care to assure that any title or heading given the agreement adequately and accurately reflects the dimensions of the relationship covered and the matters dealt with by the agreement. A lawyer has an ethical responsibility to make no false, fraudulent, misleading or deceptive representation about any aspect of a proposed professional engagement. DR 2-101(A) In any event, the attorney has the obligation to make a full disclosure to the client of all the ramifications of an agreement to arbitrate, including eliminating the right to sue in court and have a jury trial.

Dissent Of One Member To Opinion No. 190

The Committee's opinion, in its effort to encourage arbitration, provides too little in the way of assurances that a client has *knowingly* (a) waived a jury trial and (b) as a practical matter probably given up his or her ability to seek punitive damages from the attorney for professional negligence.

The Ethics Committee of at least one jurisdiction, though affected in part by particular statutory considerations not applicable here, has concluded that a lawyer may not ethically include a binding arbitration agreement in a retainer agreement. Opin. 1981-56, Calif. State Bar Comm. on Prof. Respons. and Conduct, Citing DR 6-102, 5-101, and 2-101(A). As recently as of March of this year the Philadelphia Bar Association Professional Guidance Committee, while finding that an arbitration provision in a retainer agreement is ethically permitted, concluded that this is only upon the conditions that: (1) the client is advised in writing, in simple direct language, that by agreeing to arbitration he is waiving the right to trial by jury; (2) the client is advised to seek the advice of independent counsel with regard to the waiver of a jury trial, and is given a reasonable opportunity to seek such advice; and (3) the client consents in writing.

The dissent believes that the position of the Philadelphia Committee is more consistent with the ethical responsibility a lawyer owes to his or her client, and that the "mechanics" of (1) a written explanation and (2) a recommendation that the client obtain independent advice are salutary requirements that will avoid later assertions by clients that they did not understand the full scope or impact of their acceptance of an arbitration clause in connection with retention of counsel.

The dissent believes that the Committee's interest in encouraging the use of arbitration in attorney-client disputes has led it to a position that encourages attorneys who want to have arbitration clauses to obtain them by means that fall far short of assuring that the client has knowingly consented to a waiver of rights the client otherwise would have.

Inquiry No. 87-6-29
Adopted April 19, 1988

Opinion No. 191

Propriety Of Lawyer Retaining Files During Fee Dispute

• The ethical right to assert a lawyer's lien, and then withhold client papers, during a fee dispute is a narrow one and must be used sparingly. Where an adequate letter of credit or other security is offered pending resolution of the fee dispute, a lawyer cannot continue to withhold the client's papers, even if delivery of the papers to the client reduces the likelihood of a resolution of the fee dispute short of litigation.

Applicable Code Provisions

• **DR 2-110(A)(2)** Withdrawal From Employment; Duty To Avoid Foreseeable Prejudice

[1] An agreement providing for arbitration of a fee dispute in no way modifies the attorney's obligations under the disciplinary rules, including DR 2-106(A), which provides that "a lawyer shall not...charge...an illegal or clearly excessive fee."

[2] The Committee notes that an arbitration clause may limit the attorney's right, set forth in DR 2-110(C)(1), to withdraw from representation of the client in certain circumstances. For example, a client may dispute a fee and refuse to pay the amount billed, but agree to pay the amount determined by an arbitrator. In that circumstance the attorney perhaps could not claim the client was "deliberately" disregarding "an agreement or obligation as to expenses or fees." The agreement might also reduce the number of occasions when the lawyer was unable to carry out his employment effectively.

• **DR 5-103 (a)** Acquisition Of Lien To Secure Payment For Services Rendered

Inquiry

Inquirer has an outstanding fee dispute with a former client. Inquirer refused to turn over various papers and files relating to the prior representation, despite the fact that the former client obtained a letter of credit for the amount of the disputed fees payable upon agreement of the parties or the resolution of a court that inquirer was entitled to the disputed fees. Inquirer asks whether he is now required to turn over files, even though the letter of credit does not itself guarantee the payment of the disputed fees.

Discussion

DR 5-103(A)(1) specifically allows the assertion of a "lien granted by law" in order to secure payment for services rendered. In Opinion 59, the Committee concluded that a lawyer's retaining lien was recognized by D.C. law and thus upheld the assertion of such a lien during a fee dispute by withholding files to which the client would otherwise be entitled.

The purpose of the assertion of a lien is to increase the pressure on the former client to pay for past services rendered. But DR 2-110(A)(2) requires a lawyer to take "reasonable steps to avoid foreseeable prejudice" to a former client upon withdrawal. In Opinion 168, we concluded that this duty required a lawyer to turn over to his former client all materials the withholding of which might prejudice the former client's interests. This duty, combined with the lawyer's general obligation to put his client's interests before his own, leads inevitably to the conclusion that the right to assert a lawyer's lien by withholding client materials cannot be unlimited but must take into account all relevant circumstances.

Opinion 59 recognizes these limitations, and concludes that the assertion of a lien should be avoided if at all possible. The Opinion concluded that it was the lawyer's obligation to "take the initiative in exploring whether ... there are alternatives that will reduce or eliminate the potential prejudice" caused by the assertion of a lien. Indeed, Opinion 59 concluded that it would never be ethically appropriate to assert a lien in at least three circumstances: (1) where adequate security is given; (2) where the client cannot afford to pay; and (3) where the files are necessary to defend against a serious criminal charge. This inquiry deals with the first of those three circumstances -- the definition of "adequate security."

Logically, security must be different than payment. Payment of the disputed amount would clearly extinguish the lien. Thus, "adequate security" must be interpreted in the context of an ongoing dispute, where there has been no adjudication or other determination of the *bona fides* of the disputed fee. The substitution of something of value for the client's papers must be sufficient to override the lawyer's ethical right to retain those papers, as long as the security tendered adequately protects the lawyer's interests.

One possible interpretation of "adequate security" would be the delivery to the possession of the lawyer of something of such value as to make him willingly relinquish the client's papers. But to require such actual delivery would by definition cost the client the use of that security for the period of the dispute, whether the lawyer's claim is upheld or not. While this would fully protect the lawyer's interest, it would not necessarily protect the client's legitimate interests. Fee disputes are not always between the honest lawyer and the duplicitous client, but sometimes between the dishonest or incompetent lawyer and an honest client who has no legitimate debt.

Thus, some security short of payment of the fee or actual delivery of equivalent value must be "adequate." In this case, the former client obtained a letter of credit for the full amount of the disputed fee, payable upon agreement of the parties or resolution of a court that the inquirer was entitled to the disputed fee. Inquirer refused to accept the letter of credit as "adequate security," claiming that it merely gives him the right to sue (which he already has) and thus relieves the pressure of the lien without substituting an equivalent advantage for the lawyer.

As a practical matter, inquirer's position has some merit, but DR 2-110(A)(2) and a recognition of the broad general duty of a lawyer to serve and protect client interests (even at some cost to the lawyer in some circumstances) means we cannot examine the problem merely as one between creditor and debtor. A proper letter of credit, guaranteeing payment in full if the dispute is resolved in favor of the lawyer, must be "adequate security" sufficient to override the assertion of a lawyer's lien. To hold otherwise would leave the lien as a naked enforcement tool, available to entice or extort (depending upon the merits) a payment in proportion to the importance of the withheld files. The potential for abuse is apparent.

Lacking any way to distinguish between legitimate and illegitimate use of the lien, the Code and Opinion 59 counsel us to protect the client's interest even at the potential disadvantage of the lawyer. The lawyer's lien is an unattractive and potentially quite harmful tool, and not a very desirable substitute for negotiation or some other form of dispute resolution. Its use should be narrowly circumscribed.[1] Thus, where a bond, letter of credit or other adequate security is offered, it is unethical for a lawyer to continue to withhold papers to which a former client is entitled.

In the present case, the security offered was arguably not adequate in one regard: it was limited in its terms to a period of six months, renewable for an additional period of one year if a complaint was filed to recover the disputed fees at least 30 days before the expiration date of the letter of credit. Since this time period may not be sufficient to litigate the dispute, this letter of credit may not in that sense constitute adequate security. An unlimited-in-time letter of credit, or one that automatically renewed given good-faith prosecution of the fee litigation, would constitute adequate security.

Inquiry No. 86-4-17
Adopted April 19, 1988

[1] This conclusion is buttressed by the language concerning the exercise of a lawyer's lien included in the Model Rules of Professional Conduct proposed by the Board of Governors of the District of Columbia Bar to the D.C. Court of Appeals. The Board of Governors in effect replaced the language contained in DR 5-103(a) with a prohibition on any lien upon any part of a client's files "except the lawyer's own work product and then only to the extent that the work product has not been paid for." Proposed Rule 1.8(i). In addition, Rule 1.8(i) would nullify even the work product exception when the client was unable to pay, or when withholding the work product would present a "significant risk" of "irreparable harm" to the client.

Opinion No. 192

Use Of Terms "Associated With" And "Correspondent Firm"

• A law firm is not prohibited from stating on its letterhead or in a legal directory listing that it is "associated with" a firm in another jurisdiction or that the other law firm is its "correspondent firm," presuming that these characterizations accurately describe the relationship between the firms. However, associated or correspondent law firms are treated as "affiliated" with each other for the purposes of DR 5-105(D), regarding attribution of conflicts of interest among lawyers or law firms affiliated with an attorney who is required to decline or withdraw from employment.

Applicable Code Provisions

• **DR 2-102(A)** A lawyer shall not use a professional notice that is false, fraudulent, misleading, or deceptive.

• **DR 5-105(D)** Imputed conflicts of interest to affiliated attorneys.

Inquiry

The inquiring law firm asks whether it properly can state on its letterhead and in a legal directory listing that it is "associated with" a firm in another jurisdiction or that the other law firm is its "correspondent firm." The inquirer states that it will make office space and support staff available to lawyers from the other firm when they have business in Washington. The other firm also will retain the inquirer to perform services for its clients in Washington in those areas that are within the inquirer's expertise and ability. A minimum payment is guaranteed, the terms of which are not described. The inquirer has agreed to use the other firm for appropriate work in that firm's locale, without a minimum guaranteed payment. In addition, the two firms will have compatible word processing and telecopying equipment, and the out of town firm will contribute toward the inquirer's general overhead expenses.

Discussion

DR 2-102(A) prohibits an attorney from using on letterhead or in a legal directory listing a statement that is "false, fraudulent, misleading, or deceptive." In Formal Opinion 84-351 (1984), the American Bar Association applied the same standard to the use of the terms "affiliated" or "associated" in a law firm's letterhead. That opinion found that such designations did not violate either the Model Rules or the Model Code[1] *per se*, provided that the relationship between the firms was such that the letterhead was not false or misleading, *i.e.*, that the firm was "closely associated with the other firm in an ongoing and regular relationship" that was "continuing and semi-permanent."

The Committee agrees with the approach adopted by the ABA. From the facts as stated in the inquiry, it appears that the inquiring firm and the out of town firm contemplate the establishment of a regular and ongoing relationship with one another. Given the relationship as described, the Committee concludes that neither "in association with" nor "correspondent firm are inherently false, fraudulent, misleading, or deceptive so as to proscribe their use by the inquirer. Of course, should the relationship not develop as planned or should it change to one of infrequent contacts, it would be necessary to delete this designation from the letterhead and directory listing.

In addition to discussing the permissibility of using the term "associated" in firm letterhead, Formal Opinion 84-351 also addressed certain conflict of interest issues raised by use of that term. The ABA stated that, based upon the use of the term,

> potential clients of the listing firm are led to believe that the lawyers with the ..."associated" firm are available to assist in the representation, at least in matters that the designation may describe. The client ordinarily also expects that lawyers of the ..."associated" firm will not simultaneously represent persons whose interest conflict with the client's interests.

Thus, for purposes of determining whether the associated firms "have a disqualifying conflict of interest," Formal Opinion 84-351 treated the associated firms as if they were separate offices of the same firm.

Again, the Committee agrees with the approach adopted by the ABA. A law firm would not choose to identify itself as being associated with or a correspondent of another firm if it did not seek to foster the impression that the two firms had an ongoing and regular relationship. Although the terms in question may be viewed as not having a fixed meaning, *see* Opinion 151 (1985), the Committee views "associated firms" and "correspondent firms" as creating the reasonable impression that attorneys in the firms will not represent conflicting interests.[2] The Committee therefore concludes that firms that use such terms to describe their relationship are to be treated as "affiliated" with each other for the purposes of DR 5-105(D), regarding attribution of conflicts of interest among lawyers or law firms affiliated with an attorney who is required to decline or withdraw from employment. Similarly, lawyers in the inquiring firm must exercise reasonable care to ensure that the associated firm does not disclose or use the confidences or secrets of the clients of the inquirer.

Inquiry No. 87-2-7
Adopted May 17, 1988

Opinion No. 193

Limiting Liability to One's Client

• A corporation may negotiate an agreement with its in-house staff attorneys under which (a) the corporation will indemnify the attorneys for malpractice claims by third parties, and (b) the corporation waives its right to sue its employee-attorneys for malpractice against the corporation.

Applicable Code Provision

• **DR 6-102(A)** (Limiting Liability to Client)

Inquiry

The inquirer is a not-for-profit corporation that employs a staff of attorneys to advise and represent it, and often outside parties as well, in federal and state court litigation. The organization also

[1] The ABA noted that use of the terms "affiliated" or "associated" would violate DR 2-104(A)(2) of the Model Code as written, which prohibits the use in letterhead and the like of terms not specified in the rule. However, the opinion did not apply the rule as written; the ABA stated that the decison in *Matter of R.M.J.*, 455 U.S. 191 (1982), "suggests...that this DR is unconstitutional if the rule is read to prohibit a designation that is not shown to be false or misleading." DR 2-102(A) of our rules does not suffer from the same infirmity as the corresponding Model Rule.

[2] Opinion 151 noted that "the term 'of counsel' has a variety of meanings." In Informal Opinion 1315, the ABA concluded that the prohibition of DR 5-105(D) applied to law firms that designate themselves as reciprocal of counsel.

employs attorneys in its general counsel's office to work exclusively on general corporate matters. The organization presently carries malpractice insurance for all of its attorneys through a private insurer. The policy does not include coverage for claims the organization may have against its attorney-employees, but covers only claims brought by third parties.

Citing the rising cost of malpractice insurance and the absence of any malpractice claim ever having been filed against its attorneys, the corporation proposes to discontinue its malpractice insurance. In lieu of insurance, the organization proposes to enter into a "hold harmless and indemnification" agreement with each attorney it employs. The proposed agreement would include four elements:

(1) the employer would hold each employed attorney harmless of or from any and all liability imposed on the corporation or the employed attorney due to a claim of malpractice;

(2) the employer would provide a legal defense of any claim against or investigation of the employed attorney even if the allegations of the lawsuit or other proceeding were groundless, false or fraudulent;

(3) the employer would fully indemnify and hold harmless the employed attorney for any and all costs and expenses in connection with a claim, investigation or grievance; and

(4) the agreement would not cover any final judgement or adjudication based on or arising out of dishonest, deliberately fraudulent, criminal or intentional and knowingly wrongful acts or omissions.

In essence, the organization proposes to act as a self-insurer in the event that one of the attorneys is sued for malpractice by a third party whom the organization represents. The agreement would not affect the liability of the organization or its attorneys to third parties for acts of malpractice committed by its attorneys. If such a claim is made, the organization would provide legal representation for its attorney and would pay directly from its own resources the amount, if any, awarded or the amount agreed to be paid in settlement of the party's claims. However, the agreement effectively waives the organization's right to sue its attorney-employees for acts of malpractice committed against the organization itself.

The organization states that its General Counsel will negotiate the terms of the proposed agreement with the attorney-employees. The organization will retain independent counsel to negotiate a similar agreement with the General Counsel. It asks whether the agreement violates the prohibition in DR 6-102(A) against limiting an attorney's liability to his or her clients.

Discussion

Prior to this inquiry, the Committee has not been asked to construe DR 6-102(A). However, several other jurisdictions have been presented with inquiries under this rule; the majority of these inquiries have dealt with lawyers in private practice who have attempted to exonerate themselves from malpractice liability in agreements made with individual clients. *See, e.g.*, Alabama State Bar General Counsel Opinion 83-05 (1/24/83) (DR 6-102(A) applies to cases where a lawyer tries to have his client sign a contract limiting his liability); Professional Ethics Commission of the Board of Overseers of the Maine Bar Opinion 26 (4/2/80) (lawyer who issues real estate title opinions may not limit his liability for errors in the opinions).

Only the Ethics Advisory Committee of the South Carolina Bar has dealt with the situation where an organizational client, in that instance a closely held corporation, asked its in-house lawyer to enter into an agreement whereby the lawyer was indemnified against any claims brought by the corporation or a third party arising from the lawyer's employment. The South Carolina Advisory Committee found that the agreement was proper regarding indemnification for third party claims. However, without substantial discussion or analysis, the Committee found that the agreement violated DR 6-102(A) inasmuch as it limited the lawyer's liability to his client, the corporation. We believe, however, that this opinion is unpersuasive, and we therefore decline to follow it.

DR 6-102(A) provides that "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." It is undisputed that the organization involved in this inquiry, like the South Carolina corporation, is the attorney-employee's client. *See* EC 5-18. DR 6-102(A) therefore could be read as prohibiting an agreement that fully indemnifies and "saves harmless" an attorney for services performed for the employer-organization that amount to malpractice. Nonetheless, we believe that such a strict interpretation of the rule is contrary to the purposes it serves.

DR 6-102(A) was promulgated to prevent lawyers, either through their own overreaching or their client's ignorance, from escaping liability for their negligent acts. Here, the organizational client, apparently a sophisticated business entity, has proposed to waive its right to sue its own attorney-employees for acts of malpractice committed against the organization. The corporation asserts that it has made a careful "business judgement" that it prefers to waive its rights of legal redress against its employees and to run the risk of insuring itself against third party malpractice claims, rather than continuing to pay the high cost of malpractice insurance premiums.

To the extent that the agreement at issue affects an attorney-employee's financial liability to the employing organization, it does so with the organization's full knowledge. Indeed, the organization has instigated the action, after the organization states that it carefully considered the implications of waiving its right to sue its attorney-employees for malpractice.

Given the employment relationship involved and the fact that the organization proposed the agreement, there appears to be no risk of overreaching on the attorneys' part. In addition, as noted in the inquiry, the organization has available to it the ultimate remedy in the event of an employee's malpractice, *i.e.*, discharge of the attorney-employee. As a practical matter, organizations with in-house counsel apparently use the remedy of discharging negligent employees rather than suing them for malpractice. Thus, the inquiring organization proposes to do nothing more than to make explicit what already is an implicit part of the employment relationship.

In other circumstances, DR 6-102(A) has been interpreted practically to allow clients to waive undiscovered malpractice claims based upon prior conduct.[1] We conclude that a similar practical approach to the rule is appropriate here,

[1] The Wisconsin State Bar Committee on Professional Ethics thas indicated that a lawyer may seek to limit his liability from pre-existing malpractice claims if he advises the client in writing to secure independent counsel in the negotiation and(con't.)

where the organization proceeds with full knowledge of the potential consequences of its actions and where it retains the "remedy" of discharging a negligent attorney employee.

Finally, by entering into this agreement, the organization's attorneys will not limit their liability to the third parties who they frequently advise and represent. Rather, the agreement in this regard simply shifts from an insurance carrier to the organization the burden of representing the attorney in a malpractice action and paying for any monetary liability that may result. This part of the agreement clearly does not run afoul of DR 6-102(A). We therefore conclude that the agreement does not violate DR 6-102(A).[2]

Dissenting Opinion Of Four Members To Opinion No. 193

We dissent to this committee's Opinion No. 193 insofar as it permits an employer/lawyer to enter into an agreement eliminating his liability to his employer/client for future malpractice.

The principal reason for this dissent is that the committee's interpretation simply cannot be squared with the language of DR 6-102(A) that provides:

> A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

The contemplated agreement is no less than a proscribed effort to exonerate or limit liability.

DR 6-102(A) does not permit a client to waive the restrictions the rule places on lawyers. Nor does the rule make any exception for the employee/lawyer who fears a malpractice action against him by his employer/client.[3]

The committee's decision also conflicts with Rule 1.8(g) of the Proposed Rules of Professional Conduct published on September 1, 1988 by the District of Columbia Court of Appeals. This provision reads:

> A lawyer shall not:
>
> (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice...

The American Bar Association version of the rule added the caveat, "unless permitted by law and the client is independently represented in making the agreement". It thus appears that the drafters of the District of Columbia version *intentionally removed* a provision that might make the agreement at issue permissible.

There is particularly no necessity to do violence to the clear language of DR 6-102(A) -- or to adopt a position contrary to the proposed rule -- where no practical need appears for the increased protection the employees/lawyers here desire. The insurance policy the employer/client is discarding contains no coverage for suits by the client against an employee/lawyer. The employees/lawyers thus are seeking more protection than they previously have had. Moreover, no malpractice suits by corporations, especially nonprofit corporations, against their employees/lawyers have been called to our attention, and it is fair to assume that such litigation is rare. Normally, an employer proceeds against a transgressing employee/lawyer by dismissing him.

In addition, the employer/client unilaterally could announce its policy not to sue employees/lawyers for malpractice against it, thus providing a large degree of comfort to the employees/lawyers. While the committee is not empowered to make rulings on legal issues, it may well be (1) that such a policy statement would be enforceable by an employee/lawyer against the corporation, and (2) that, *after* an event giving rise to a malpractice claim arises, an employee/lawyer could attempt to enforce such policy without running afoul of DR 6-102(A). The proposed rule expressly, and the existing rule by interpretation, declare that a lawyer cannot limit his liability for malpractice committed in the future; however, it is not unethical to use available facts and law to mount a defense in a malpractice claim once the challenged conduct has occurred.

The committee should follow South Carolina Advisory Opinion No. 85-30 (undated), which is referred to in the majority's opinion, and conclude that the proposed arrangement violated DR 6-102(A). It is useful to recall that this committee has no legislative function; it must apply the Disciplinary Rules as promulgated by the District of Columbia Court of Appeals. If the rules require alteration, the Court should be petitioned -- as is particularly appropriate during the current comment period on the Proposed Rules of Professional Conduct. While this committee's task is to interpret the rules, it should not contort those rules beyond recognition to reach a desired policy result.

Inquiry No. 87-11-55
Adopted: September 20, 1988

Opinion No. 194

Restricting A Lawyer's Ability To Practice Law

• The withdrawal provisions of a law firm partnership agreement may not properly include a provision exacting a monetary penalty from a withdrawing partner if he or she enters into a practice of law competitive with that of the law firm after withdrawing from the firm.

Applicable Code Provision

• **DR 2-108(A)**(Agreements Restricting The Practice Of A Lawyer)

Inquiry

The inquirer requests the Committee's opinion on the propriety of a provision in a law firm's partnership agreement under which a payment otherwise due a partner who withdraws from the firm is reduced

consummation of such an agreement. *See* Opinion No. 85-12 (1/86). The Ethics Committee of the Massachusetts Bar Association similarly has stated that an attorney may seek a release from liability in some circumstances if the client knowingly consents after full disclosure and is advised to seek independent counsel regarding the release. *See* Opinion 82-1 (1/12/82).We cite these decisions because they represent instances in which DR 6-102(A) has not been rigidly interpreted. Our reference to these decisions should not be interpreted as indicating the Committee's views on the issues presented in those cases, which have not been presented to the Committee for decision.

[2] The Rules of Professional Conduct proposed by the District of Columbia Court of Appeals on September 1, 1988, would prohibit an attorney from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice." Proposed Rule 1.8(g)(1). The Committee intends to seek guidance from the Court of Appeals, during the designated comment period on the proposed rules, regarding the impact of the Proposed Rule 1.8(g)(1) upon the result reached in this opinion.

[3] The committee's opinion can be read to place an employee/lawyer in a different position than a lawyer in private practice, and thereby creates a potential for abuse. Not all corporate officers are sophisticated or careful, and an unscrupulous lawyer might attempt to overreach and exonerate himself in advance from malpractice claims by the device of becoming a corporate employee with a favorable contract.

if the withdrawing partner enters into a practice of law competitive with that of the firm within 12 months of the effective date of the withdrawal. The provision in question is a proviso to a paragraph of the agreement under which a withdrawing partner is entitled to receive payment of a share of the law firm's unrealized accounts receivable and of amounts due or to become due for work performed prior to the date of withdrawal. The specific language is as follows:

> "...provided, however, that should the withdrawing partner within twelve (12) months of the effective date of his withdrawal enter into a practice of law competitive with that of the firm, then payments under this (c) shall be reduced by one-half (1/2)..."

Other payments provided for by the agreement, such as the payment of undistributed net profits and the withdrawing partner's permanent capital account, are not affected by the proviso.

Discussion

The issue presented is whether the proviso in question restricts a lawyer's right to practice law in violation of DR 2-108(A), which states that:

> "A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits."

In Opinion 181 (1987), the Committee's most recent application of DR 2-108 (A), the Committee reviewed its own prior opinions construing the rule, several opinions of the ABA Standing Committee on Ethics and Professional Responsibility, and a number of court decisions striking down agreements restricting attorneys' right to practice law. In Opinion 65 (1979), the Committee disapproved an agreement that required a lawyer who performed services for clients of his former law firm to pay the former firm 40% of his net billings to such clients for two years after his departure from the firm. The opinion held that, while the agreement did not prohibit the lawyer from representing his former firm's clients, it nonetheless was a restriction on the right of the lawyer to practice law after the termination of the relationship created by the employment agreement. In Informal Opinion 1171 (1971), the ABA Committee held that DR 2-108(A) was violated where a partnership agreement prohibited a withdrawing partner from performing any legal services for two years for any client of the firm or of another partner of the firm, or who was a client of the firm one year prior to the withdrawal, except for clients initially brought to the firm by the withdrawing partner. In Informal Opinion 1417, the ABA held that the disciplinary rule also prohibits an agreement between law partners requiring that a withdrawing partner refrain for a stated period from hiring or otherwise associating with any associate employed by the firm at the time of the partner's withdrawal. And, as noted in Opinion 181, in *Gray v. Martin*, 663 P. 2d 1285, 1290-91 (Or. 1983), the court held that a clause that eliminated payments a partner would receive upon withdrawing from a firm if the lawyer practiced law in certain designated geographic areas violated the public policy that prohibits restrictions on a lawyer's right to practice law.

As was observed in Opinion 181:

> "The ABA and court decisions...demonstrate a general hostility toward restrictive agreements and persuade this Committee that it should carefully examine any such agreements that come before it. We also take notice of the fact that the nature of the legal community and the rules governing its conduct are changing. The Washington bar has grown exponentially in recent years. Many out of town firms are opening branches in the city, and for this and other reasons many lawyers have left their old firms to form new associations. Moreover, the rules regarding advertising and solicitation now allow lawyers more freedom to seek and develop clients than was available in times past. While a law firm undoubtedly has a legitimate interest in maintaining its clients, we are hesitant to announce views that unduly restrict the ability of lawyers to change relationships in order to advance their careers, or that prevent or unduly hinder clients from obtaining legal representation from attorneys of their own choosing who may have formed new associations."

Turning to the agreement now before it, the Committee feels that, while the proviso in question does not expressly prohibit a withdrawing partner from engaging in the practice of law, the monetary penalty it exacts, if a withdrawing partner enters into a law practice competitive with that of the former firm within the year following his or her departure from that firm, clearly constitutes a restriction on the right of the lawyer or lawyers involved to practice law. The penalty levied by the proviso applies not only where continued law practice by a departing partner includes clients of his former firm. It casts a considerably broader net by exacting its economic sanction if the erstwhile partner enters into *any* practice of law competitive with that of the former firm. Its Martindale & Hubbell listing describes the law firm in question as engaged in a "General Practice before all Courts and Administrative Agencies". Arguably, virtually any new practice by a withdrawing partner would be competitive and trigger the sanction. The proviso also erects an economic disincentive to the acceptance by the departing lawyer of lawyer-client relationships with clients of the former firm who might solicit his or her professional services, and thus interferes with such clients' choice of counsel.

In the Committee's view, the proviso in question is an impermissible restriction on the right of partners withdrawing from the law firm to practice law after the termination of the relationship created by the partnership agreement, and violates DR 2-108(A) of the Code.

Inquiry No. 88-7-21
Adopted November 15, 1988

Opinion No. 195

Assignment of Rights to Invention to Secure Payment of Fee for Services Rendered in Prosecuting Patent Application

• A patent attorney may not enter into an agreement with a client for whom he has been prosecuting a patent application to secure payment of outstanding fees wherein the client assigns all rights to the patent to the lawyer, such rights to be reassigned to the client after payment in full upon a specified payment schedule. The lawyer may withdraw from employment by abandoning the patent application so long as he complies with the requirements of DR 2-110 relating to withdrawal from employment.

Applicable Code Provisions

• **DR 2-110** (Withdrawal from Employment)
• **DR 5-101(A)** (Conflict of Interest)
• **DR 5-103** (AvoidingAcquisition of Interest in Litigation)

Inquiry

The inquirer is a patent attorney who wishes to enter into an agreement with a client to secure payment of the client's overdue account for services rendered in connection with a patent application. Under the agreement the client assigns to the attorney all his rights in the invention which is the subject of the patent application. The agreement provides for payment of principal and for interest at the rate of 10 per cent per year, payable in monthly installments. It requires the lawyer to reassign the patent rights once the fee is paid in full.

When the client has failed to make the agreed upon payments, the inquirer asks:

(a) May he sell the patent rights without accounting to the client for any of the proceeds, even those which exceed the amount due the attorney under the agreement;

(b) If the lawyer must account to the client for the proceeds, may the lawyer charge a fee for his time and pass through to the client the costs he incurs in selling the patent;

(c) If the lawyer must account to the client for the proceeds of the sale, does the lawyer have an obligation to obtain the best price for the invention;

(d) If the client breaches the agreement before the patent issues, may the attorney abandon the patent.

Discussion

DR 5-103 (Avoiding Acquisition of Interest in Litigation), provides, in part:

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(Footnotes omitted). By the Assignment Agreement the attorney would acquire a proprietary interest in the invention which is the subject matter of the litigation--the patent application--he is conducting for the client.

DR 5-103(A) carves out two exceptions to the prohibition against acquisition of an interest in the litigation: for liens granted by law to secure payment of fees, DR 5-103(A)(1), and for reasonable contingent fees, DR 5-103(A)(2). This inquiry, therefore presents the threshold question whether the Agreement runs afoul of DR 5-103(A). The answer turns on whether the Agreement fits within one of the two exceptions.

Charging or Retaining Lien

DR 5-103(A)(1) refers to the common law "charging lien" and the common law "retaining lien." D.C. Bar Legal Ethics Committee, Opinion 59 (undated) ("Opinion 59"). The retaining lien is the attorney's right to hold the client's papers, property and funds, as well as the attorney's own work product, to compel payment of fees for the lawyer's services. Id.; D.C. Bar Legal Ethics Committee, Opinion 100 (undated) ("Opinion 100"). The retaining or general lien attaches to the property of the client to secure fees and costs due for all professional services rendered by the attorney, not just those due in the particular matter in which the property came into the lawyer's possession. *Id.*; Speiser, *Attorneys Fees*, Sec. 16:5 - 16:13.

The existence of the retaining lien depends upon possession by the attorney of the client's money or property. It merely gives the attorney the right to retain the property until the fees and costs are paid. The lien is a passive one which does not include the power to sell the subject of the lien. Speiser, 16:5, 16:13.

The special or charging lien attaches only to a cause of action, verdict or judgment, or the proceeds thereof, and only for the fees and costs due for that particular action. Unlike the retaining lien, the charging lien does not depend upon possession. Speiser, Sec. 16:14 - 16:17; Opinion 100, Fn. 4. A charging lien can be enforced on application to the court in the original action in which the services were rendered or by a court of equity in an independent action.[1] *Id.*, Sec. 16:36, 16:39.

We have previously noted that DR5-103(A)(1) encompasses only charging and retaining liens. Opinions 59, 100. However, based upon the preceding discussion, we believe the Agreement creates neither lien. It purports to authorize the attorney to sell the property and to do so without application to any Court. Therefore, it does not fit within the exception of DR 5-103(A)(1).

Contingent Fee Contract

In Opinion 179 we considered whether an attorney's acquisition of an equity interest, in lieu of a cash fee, in the client's business, an entity applying for an FCC license, was a permissible contingent fee contract. We stated:

> The ethical issue arises in the circumstances of this inquiry because in some cases the stock of the client will have no or very little value unless the application which the "subject matter of litigation" being conducted for the client is successful. In such circumstances it would be overly formalistic to view the corporate stock and the "cause of action" or "subject matter of litigation" as different things. Instead, where a pending application is the only thing which gives any potential value to what would otherwise be mere pieces of paper, we conclude that the integral relationship between the value of the corporation's stock and the success or failure of its application for a license cannot be ignored.

Thus, accepting the stock was the same thing as accepting an interest in the subject matter of the litigation. However, we also recognized that the stock received was in reality a contingent fee, which, if reasonable, fit within the exception of DR 5-103(A)(2) for reasonable contingent fees. Id. We concluded that such fee arrangements are permissible contingent fee agreements provided the fees are reasonable, the client is fully informed, and the arrangement does not create an actual or potential conflict of interest. As we noted:

> ...DR 5-101(A) and DR 5-105(A) forbid a lawyer from putting himself in a position where his personal interests conflict with the interests of his client. Thus, in our view it would be unethical...for an attorney to accept and exercise such control over the client that its interests are in any sense actually or potentially subordinated to his own.

In contrast to the agreement discussed in Opinion 179, the Assignment Agreement is not a contingent fee contract permitted by DR 5-103(A)(2). First, the liability of the client for the lawyer's fees does not appear to be contingent on the success of the patent application, although the likelihood of the client's ever making good on the obligation may well be contingent on success. More importantly, the assignment agreement appears to give the attorney virtually total control

[1] For example, in *Schroeder, Siegfried, Ryan & Vida v. Modern Electronic Products*, 295 NW2d 514 (Minn. 1980), the plaintiff law firm filed suit to foreclose on an attorney's charging lien on a patent owned by the defendant to recover fees for work done in connection with the patent application. The court ruled that the lien attached to the patent and ordered that the patent be sold to satisfy the lien.

over the disposition of the patent application once the client has failed to make the agreed upon payments. As discussed in Opinion 179, an agreement which gives the attorney such control is not a permitted contingent fee agreement.

Indeed, implicit in the third question posed by the Inquirer--whether he must attempt to obtain the best price for the invention if he sells it--is the recognition that the attorney's interests may come into conflict with those of the client as a result of the assignment agreement. The attorney might find that it is in his interest to sell the patent quickly and for the amount necessary to cover the outstanding fees. On the other hand it might be in the client's interest to hold out for a higher price or try to interest other bidders in the invention. It is just this kind of conflict which must be avoided.

Sale of the Patent Rights

It follows from the above discussion that the lawyer cannot sell the patent rights. Therefore, the questions concerning accounting to the client for the proceeds and obtaining the best price need not be addressed.

Abandonment of Patent Application After Breach of Agreement

The inquirer informs us that abandonment of the patent application would occur if the application were granted and the additional fee then due were not paid, or if the application were denied and the applicant failed to file an appeal. If the employment agreement covers additional work to be done after the application is granted or denied by the patent office, then abandonment of the application necessarily constitutes withdrawal from employment.

The propriety of the lawyer's abandoning the patent application if the client breaches the fee agreement is governed by DR 2-110 (Withdrawal from Employment). It provides in part:

(A) In general

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before a tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

...

(C) Permissive Withdrawal.

...[A] lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

...

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses and fees.

To comply with DR 2-110 the lawyer must first determine whether permission of a tribunal is required. The lawyer must next consider whether any of the bases for permissive withdrawal exist. DR 2-110(C)(1)(f) provides a justification for withdrawal where the client has failed to pay fees or costs.

Even where permission of a tribunal is not required, the lawyer must take certain steps to avoid prejudice to the client, including giving notice to the client, allowing time for employment of other counsel, and delivering to the client any papers and property to which the client is entitled. The determination as to which papers and property the client is entitled to receive at the point of withdrawal may depend upon whether the attorney asserts a retaining lien or a charging lien.

Summary

In sum, we conclude that the agreement assigning to the lawyer the rights to a patent to secure fees incurred in prosecuting the patent application constitutes an impermissible acquisition of an interest in the subject matter of the litigation, in violation of DR 5-103(A), and that the assignment agreement does not fit within either of the exceptions to DR 5-103(A) for liens granted by law to secure payment of fees or for contingent fee contracts. We further conclude that the lawyer may withdraw from employment upon the client's failure to meet his financial obligations so long as the lawyer follows the requirements of DR 2-110.

Inquiry No. 85-12-47
Adopted December 13, 1988

Opinion No. 196

Financial Assistance For Client

• Arrangement by which Lawyer refers a contingent fee personal injury client who is in dire financial straits to finance company which may loan funds to client based on lender's evaluation of the strength of the case where lawyer's only connection to the transaction is an agreement to pay the finance company out of proceeds of settlement or verdict does not violate rule requiring lawyer to avoid acquiring interest in litigation.

Applicable Code Provision

• **DR 5-103 (B)** (Avoiding Acquisition of Interest In Litigation)

• **EC 5-8** (Financial Assistance To Client Not Encouraged But Not Improper In Some Instances)

Inquiry

The inquirer, a lawyer who has represented personal injury clients for many years, informs the committee that he is often confronted with situations in which clients who have been involved in automobile accidents, whose injuries prevent them from working, and who, because of dire economic straits, are unable to pay their medical and other bills, come to him with desperate requests for loans to pay for medical treatment, medication for pain, to purchase food, to meet home mortgage payments to avoid foreclosure, and for other necessities of life. According to the inquirer, it takes him an average of two to three years to resolve many of such cases. Many of the clients are out of work, are poor credit risks, and genuinely in need of financial help. In an effort to deal with such situations, the inquirer has located a finance company, which he may be able to persuade to loan funds to such clients. The finance company would have no connection with the clients or the lawyer, other than as a lender. The loans would range from $1,000 to $10,000 and average about $2,500. With the consent of the client in writing, the finance company would independently investigate the case to satisfy itself concerning liability, damages, and insurance coverage. Once approved, the loan - which would include a lawful rate of interest - would be repayable when the client's case is resolved by settlement or trial and the proceeds collected. As part of the loan transaction, the client would direct the lawyer in writing to repay the loan out of the proceeds

of the case, and the lawyer would agree to treat the loan as a lien against the proceeds. The lawyer would not guarantee, cosign, or become responsible for the loan. It is the inquirer's opinion that such an arrangement would not violate the Code of Professional Responsibility, and would be beneficial for his clients.

Discussion

The relevant provision of the Code, DR 5-103(B), is a follows:

> "While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to his or her client, except that a lawyer may pay, advance or guarantee the expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence."

In addition, EC 5-8 notes that a prohibited financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client, and states that while such assistance generally is not encouraged, there are instances when it is not improper to make loans to a client (as when advancing or guaranteeing the payment of litigation expenses so that an impecunious client's cause can go forward).

In the committee's view, the arrangement described by the inquirer, which involves no monetary outlay by the lawyer, is not proscribed by DR 5-103(B). Under the facts presented, the lawyer neither advances nor guarantees financial assistance to his client. The lender, described as a finance company with no connection to the lawyer or his client other than the loan, conducts its own investigation and decides independently to lend or not to lend, as lending institutions generally do. In effect, the risks are examined and a bet is made that the loan will be repaid. The transaction is one between the lender and the client. The lawyer's agreement to treat the loan as a lien against the proceeds of the case is not at odds with the Code.

While not applicable to the present inquiry, it is appropriate to note that Rule 1.8(d) of the Proposed Rules of Professional Conduct now awaiting action in the D.C. Court of Appeals, which would replace DR 5-103(B) if the new rule is approved, would enlarge the financial assistance a lawyer could properly provide a client by permitting, in addition to the forms now allowed "other financial assistance which is reasonably necessary to permit the client to institute or *maintain* the litigation or administrative proceeding". (Emphasis added) The history of the new language makes it clear that one of its purposes is to allow lawyers to provide financial assistance in situations where the client may be forced to settle the claim prematurely and improvidently when he or she cannot afford to pay necessary medical or living expenses while the claim is being litigated.

Inquiry No. 88-8-24
Adopted January 17, 1989

Opinion No. 197

Use Of The Term "Of Counsel;" Division Of Fees

• A law firm is not prohibited from using the term "of counsel" to describe its relationship with an attorney in another jurisdiction, where that attorney is regularly available for consultation and advice with the law firm and its clients. Whether the of counsel attorney must comply with the requirements of DR 2-107(A) before he splits a fee with the law firm, and whether those requirements were met when they do apply, depend upon the precise nature of the relationship and the circumstances of the representation.

Applicable Code Provision

• **DR 2-102(A)**(Not Using False, Fraudulent, Misleading or Deceptive Professional Notices)
• **DR 2-107(A)**(Division of Fees Among Lawyers)

Inquiry

The inquiring law firm asks whether the following arrangement with a member of the D.C. Bar who resides in another jurisdiction is proper. On its letterhead, the firm identifies as "of counsel" an attorney who also is a partner in another law firm in another jurisdiction. The inquirer has a regular practice relationship with the of counsel attorney, in which the attorney is available to the firm for regular and frequent consultation and advice.

The manner in which the firm and the attorney share fees varies, depending upon the circumstances. In matters in which both the law firm and the of counsel attorney perform services, the attorney receives a share of the income proportionate to the services he renders. The inquirer states that this arrangement is fully disclosed to prospective clients. In matters referred by the of counsel attorney to the law firm in which the attorney does not participate, the law firm pays the attorney's professional expenses -- his bar dues, his malpractice insurance premiums and the like -- up to a previously set percentage of the fees generated by the matter.

Discussion

This inquiry raises two separate but related issues: whether the designation of the out-of-state attorney is appropriate, and whether the arrangement regarding division of fees is proper. Both of these issues were discussed in the Committee's Opinion 151.

A. Using the "Of Counsel" Designation

In Opinion 151, the Committee noted that the "term 'of counsel' has a variety of meanings." Among the possible relationships noted in the opinion was an attorney "who is available to the firm for consultation and advice." Opinion 151 took a practical approach to the use of the term "of counsel," noting that "the concept is still evolving."

Given the flexibility contemplated by this opinion, the Committee concludes that there is nothing inherently "false, fraudulent, misleading, or deceptive," DR 2-102(A), in identifying the relationship described in the inquiry as "of counsel" *See also* Opinion 192. As described, the law firm and the of counsel attorney engage in frequent professional contact under which the attorney is available to the firm for consultation and advice. The designation "of counsel" appears appropriate.

B. The Division of Fees

The issue of the division of fees presents a more difficult question. DR 2-107(A) provides:

> A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure what a division of fees will be made.
>
> (2) The division is made in proportion to the services performed and

responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

In Opinion 151, the Committee concluded that, if an of counsel lawyer in fact functions as a partner, member or employee of a firm, the firm and the attorney may divide fees without meeting the requirements of DR 2-107(A). The Committee noted that such a determination was to be based upon the nature of the relationship in each case.

From the facts presented in this inquiry, the Committee cannot conclude that the relationship of the of counsel attorney and the law firm "is like that between partners or between associates and the firm." Opinion 151. The of counsel attorney practices in a city in which the law firm does not maintain an office and is a partner in another firm in that location. Indeed, the latter fact indicates that the attorney himself recognizes a difference between the partner and of counsel relationships he maintains with the two firms. The Committee therefore concludes that the inquirer and the of counsel attorney may divide fees only if the requirements of DR 2-107 (A) are met.

As described in the inquiry, the division of fees in matters in which both the firm and the of counsel participate appears appropriate, presuming that the total fees are not clearly excessive. The fee sharing arrangement has been described as fully disclosed to the client, and the division is based upon the services the of counsel attorney performs.

However, the division of fees in referred matters in which the of counsel attorney does not participate appears to run afoul of the rule. As described, the of counsel attorney's share of fees in those cases is based upon a previously established percentage; he performs no services and assumes no responsibility for the cases. That the of counsel's share of the fees is treated as a payment of his professional expenses up to the established ceiling does not change the nature of the fee sharing arrangement.

Inquiry No. 88-4-11
Adopted January 17, 1989

Opinion No. 198

Propriety of Including "No-Fault" Personal Injury Protection Payments as Part of the Fund Subject to a Contingent Fee Agreement With a Client

• It is unethical to include Personal Injury Protection ("PIP") payments recoverable under the D.C. No-Fault Motor Vehicle Insurance Act as part of the fund subject to a contingent fee agreement with a client; only a "reasonable" fee may be charged for preparing and processing the PIP application.

Applicable Code Provisions

- **DR 2-106** (Fees for Legal Services)
- **EC 2-20**

Inquiry

Under the District of Columbia Compulsory/No-Fault Motor Vehicle Insurance Act as originally enacted in 1982 (the "No-Fault Act"), personal injury victims of automobile accidents were to be compensated by their own insurance company, regardless of who was at fault, for out-of-pocket expenses such as medical costs, loss of income, and funeral expenses. These are referred to as "Personal Injury Protection" ("PIP") benefits, and they are ordinarily swiftly received as a matter of course from the injured party's insurance company following the filing with the insurance company of a relatively simple PIP application form. As a corollary to the "no-fault" principle embodied in the No-Fault Act, tort lawsuits seeking recovery for pain and suffering and other non-economic injuries were significantly restricted, but they remain permitted in the case of severe injuries and under a few other specially enumerated circumstances.

As a result of amendments of the No-Fault Act that became effective March 4, 1986, the theretofore compulsory PIP benefit feature was made optional.[1] Auto insurers in the District of Columbia are required to offer PIP benefits as an option to the policyholder. If the policyholder purchases the PIP option and is thereafter injured, the policyholder has the further option of accepting the PIP benefits in lieu of seeking recovery through a tort suit. Only in the case of an extraordinarily severe injury (as defined in the No-Fault Act) or death may a policyholder accept the automatic PIP benefits and also retain the right to bring a tort suit for non-economic injury against any party allegedly at fault. If a policyholder elects not to purchase the PIP option, or having purchased it declines to accept the PIP benefits, any such injured policyholder then has the normal right to bring a tort suit against any party allegedly at fault under legal principles applicable without regard to the No-Fault Act. *See generally Diamond v. District of Columbia*, 792 F.2d 179 (D.C. Circuit 1986).

In summary, there are now four possible scenarios under the No-Fault Act, depending on (i) whether the accident occurred before the effective date (March 4, 1986) of the 1986 amendments, (ii) the severity of the injuries, (iii) whether the injured party was contributorily negligent, and (iv) what options the injured party exercises:

(a) No recovery is possible.

(b) The automatic PIP benefit is the only possible recovery.

(c) The PIP benefit is automatically recoverable *and* non-economic damages are potentially recoverable by means of a tort suit.

(d) No PIP benefit is recoverable, but both out-of-pocket expenses and non-economic damages are potentially recoverable by means of a tort suit.

The inquirer asks whether the lawyer acting as counsel to an automobile accident victim may include PIP payments as part of the recovery fund subject to the lawyer's contingent fee agreement with the client, either in the case where PIP payments are the only potential recovery, or in the case where there is a potential for recovery of PIP benefits plus damages for pain and suffering and other non-economic injury.

Discussion

The No-Fault Act was the subject of our Opinion No. 184 (June 16, 1987). In Opinion No. 184 we concluded that "[a] reasonable fee for the processing of an application for PIP benefits is ethical." In that Opinion we pointed out that, with rare exceptions, the legal work in preparing and processing the PIP application is "neither complex nor substantial," and that a "reasonable fee" in any such case would by definition almost always be a relatively small one.

Our Opinion No. 184 did not deal with

[1] *See* D.C. Code 35-2101-2114 (1988 Supp.)

the propriety of a contingent fee agreement with respect to PIP benefits. The rationale of that Opinion, and other relevant principles and legal authorities, compel the conclusion that generally PIP benefits may not be included as part of any fund that is subject to a contingent fee agreement between the lawyer and the client who is an automobile accident victim. This conclusion applies in the case where the PIP benefit is the only fund that is potentially recoverable, as well as in the case where the PIP benefit is only a part of -- and perhaps a relatively small part of -- a much larger fund that is potentially recoverable because of the victim's pain and suffering and other non-economic injury. In the latter case, the potential recovery for pain and suffering and other non-economic injury may, of course, be the subject of a contingent fee agreement with the client under the usual standards governing contingent fee agreements in personal injury cases, but the fee agreement with respect to the PIP benefit portion of the anticipated recovery is governed by our Opinion No. 184.

A contingent fee agreement with respect to PIP benefits is usually unethical because, even if the fee was a relatively small percentage of the PIP benefits, in almost every case any such fee would be "clearly excessive" within the meaning of DR 2-106(A), after applying the criteria listed in DR 2-106(B). Further, the two traditional justifications for contingent fee agreements discussed in EC 2-20 -- that (i) in many cases they provide the injured party's only effective means of obtaining competent counsel, and (ii) counsel's skill as an advocate produces a fund out of which the fee can be paid -- are absent in the claim for and recovery of PIP benefits. Anybody with an elementary school education can fill out the PIP application, and the monetary recovery is generated not be the talent and skill of the injured party's lawyer but by the No-Fault Act. In the foregoing observations we are in accord with the Maryland State Bar Association, which in its Formal Opinion No. 76-1F (February 10, 1976) reached the same conclusion for essentially the same reasons.

As indicated above, there will be rare cases where for one reason or another there is a genuine dispute between the insured party and the insurance company as to the liability for payment of PIP benefits, or as to the proper amount of the payment. In such instances, subject to the "reasonableness" criteria in DR 2-106(A) and (B), the lawyer may charge a substantial fee, or may enter into a contingent fee agreement with the client, with respect to the PIP benefits.

In any event, we reemphasize the point made in our Opinion No. 184: it is especially important in this context that the lawyer "be certain to explain fully any fee arrangement related to these services [processing the PIP application]," and that "[a] written fee agreement at the outset of representation is preferable."

Inquiry No. 87-4-19
Approved: January 17, 1989

Opinion No. 199

Communicating with Adverse Party

• A lawyer representing the government in an internal investigation may not communicate on the subject of the investigation with a government employee known to be represented by a private lawyer in that matter without the consent of that lawyer, unless authorized by law to do so. This rule obtains whether or not the investigation is aimed merely at establishing the facts or also at providing the basis for legal advice; whether or not the government lawyer knows that the government employee might be implicated in wrong-doing and thus might become a party to some formal proceeding; whether or not the communication is to consist solely of a written request for access to government documents that the government lawyer might obtain through others; and whether or not the government employee would be required to turn over the documents by applicable law, unless that law constitutes authorization for the lawyer to communicate with the employee without prior consent of the latter's lawyer.

Applicable Code Provisions

• **DR 7-104(A)(1)** (Communicating With One of Adverse Interest)

Inquiry

We are asked to render an opinion on the following facts: A government official asked a government lawyer to investigate allegations of impropriety within an agency subject to the official's responsibility and control. The government lawyer then requested the head of the agency in writing to provide access to agency records bearing on the allegations under investigation. Although the investigation had not focused on any alleged wrong-doing by the agency head, the agency head retained a personal lawyer to represent him in the matter. That lawyer, in turn, insisted that the government lawyer make any requests to him rather than the agency head. The government lawyer maintained that he was not required under the Code of Professional Responsibility to comply with that request because he was merely conducting a fact-finding investigation that a lay person could have conducted. In addition, the government lawyer did not intend to conduct a face-to-face interview of the agency head; the government lawyer could have obtained access to the government records without making any request of the agency head; and the agency head was a government employee assertedly required by applicable law to turn over the requested documents.

Discussion

This inquiry arises under DR 7-104(A)(1), which states:

> "During the course of his representation of a client a lawyer shall not ... [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Several issues are presented. We discuss each in turn:

I.

All the disciplinary rules, of course, govern the conduct of "lawyers" only. Moreover, DR 7-104(A)(1) by its terms applies solely "[d]uring the course of ... [a] representation of a client" by a lawyer. The first question presented stems from the fact that the investigation in this case was aimed simply at establishing certain facts and arguably might have been performed as readily by a lay person as by the government attorney. Does this fact affect application of the disciplinary rules in general and DR 7-104(A)(1) in particular?

We think not. Factfinding is part of the lawyer's function, and we see no reason why lawyers performing this task alone do not come within the ambit of the disciplinary rules, including DR 7-104(A)(1). Lay investigators may be at liberty to approach and interrogate wit-

nesses without authorization from the latter's counsel. Lawyers, however, are subject to the special requirements of DR 7-104(A)(1) in order to facilitate the receipt of legal advice or assistance by the clients of other lawyers. As stated in EC 7-18:

> "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person."

The fact that a lawyer might be engaged only to conduct an investigation does not alter this interest and thus provides no basis for relaxing the requirements of DR 7-104(A)(1).

It is true that when an investigation is not undertaken for the purpose of rendering legal advice, the content of the investigation is outside the protection of the attorney-client privilege. *See In re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). It does not follow, however, that an attorney performing such an investigation is not proceeding as a "lawyer" "representing" a "client" within the meaning of the Code of Professional Responsibility. The lawyer's role is not circumscribed by the attorney-client privilege.

II.

Another issue raised by this inquiry is whether the agency head was a "party" represented by another lawyer in the matter. The Committee has previously addressed the meaning of the term "party" in DR 7-104(A)(1). In Opinion No. 80, which concerned communications with government officials, the Committee concluded that the term "includ[es] only those persons who have the power to commit or bind the government with respect to the subject matter [in] question, whether it be the initiation or termination of litigation, execution or approval of a contract, issuance of a license, award of a government grant, or a rulemaking function...."[1] In Opinion No. 129 a majority of the Committee similarly concluded that an employee of a corporation is not a 'party' to litigation within the meaning of DR 7-104(A)(1) unless that employee is authorized to bind the corporation with respect to the conduct of the litigation.

In Opinion No. 178, however, a majority of the Committee concluded that a grand jury witness with potential criminal exposure is a "party" under the disciplinary rule even though no charges have yet been lodged against him. The majority explained:

> "The word 'party' is not defined in the Code, and we think that it should be interpreted in a common-sense manner. There need not be some actual pending charge against the witness before he or she would be entitled to the protection that DR 7-104(A)(1) affords. We do not here conclude that every witness who has undertaken to obtain advice of counsel is entitled to be considered a 'party' within the meaning of DR 7-104(A)(1); but the circumstances of the present case require the application of DR 7-104(A)(1): a grand jury investigation was underway. The witness appeared to be exposed to potential criminal charges or penalties, and had engaged counsel in connection with the investigation."

In each of these prior opinions the Committee has interpreted the term "party" by balancing conflicting interests, particularly facilitating access to evidence, on the one hand, and bolstering the attorney-client relationship, on the other. The Committee believes that the balance of interests in the present case tips in favor of application of DR 7-104(A)(1). Although the framers of the disciplinary rule did not mean to encumber the search for evidence unnecessarily, the agency head here had specifically engaged a lawyer to represent his interests in connection with the precise matter at hand. Moreover, he had done so presumably because he felt that his interests might be adverse to those of the government. The circumstances are very close to those in Opinion No. 178, where the witness had retained a defense attorney and was found to be entitled to the protections of DR 7-104(A)(1).

Of course, in Opinion No. 178 the lawyer had reason to believe that the witness was exposed to liability, thus was potentially a party in litigation, and hence had a concrete need for legal assistance. That does not appear to be the case here. Nonetheless, if the purpose of the disciplinary rule is to help secure the attorney-client relationship, it should not matter whether the person to be contacted is or is likely to become a party to a proceeding in any formal sense. Furthermore, application of the rule should not turn on whether known circumstances indicate that the person actually has an interest adverse to those of the lawyer's client and, therefore, is in need of legal services. It is reasonable instead to assume that when clients ask lawyers for assistance and the latter agree to be retained, it is for good reason. Accordingly, the person's own assessment of the need for legal assistance, as demonstrated and confirmed by the specific engagement of counsel, suffices for DR 7-104(A)(1) to apply.

This is the express approach of Rule 4.2 of the Proposed Rules of Professional Conduct for the District of Columbia, which in terms similar to DR 7-104(A)(1) governs communications between lawyers and opposing parties. Comment [4] to Rule 4.2 states that the prohibition on unauthorized communications applies in favor of "any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." We think that this approach is controlling in the District of Columbia, whether or not Rule 4.2 replaces DR 7-104(A)(1).

The application of DR-104(A)(1) to this case is not an idle technicality. Although the government attorney evidently saw no question regarding his entitlement to access to the documents he requested, the agency head's lawyer might have seen things differently. There might have been doubt, for example, concerning the agency head's obligation to turn over personal handwritten notes, telephone messages, or the like. His private attorney was in a position to provide advice on these and other issues.

III.

Finally, the question arises whether any of the other factors mentioned in the inquiry affect application of DR 7-104(A)(1). The answer is relatively simple -- DR 7-104(A)(1) means what it says when it bars a lawyer, in the absence of authorization, from communicating on the subject of the representation with a person known to be represented by another lawyer in the matter. As the Committee stated in Opinion No. 120, sending a defendant a settlement letter contravenes "the plain wording of DR 7-104(A)(1)." Thus, DR 7-104(A)(1) applies even though the government lawyer in this case communicated with the agen-

[1] Opinion No. 80 goes on to state: "The rule has no application even in such circumstances unless counsel has specifically been given responsibility for representing the governmental party in the matter and the private party's counsel has effectively been notified of that fact."

cy head in writing and did not seek to interview him. The lawyer's request for documents believed to be relevant to the investigation constituted a "communication" on the subject of the representation.

Likewise, it is immaterial that the lawyer may have been able to obtain the government records without the agency head's assistance. Nothing in DR 7-104(A)(1) limits the rule to communications that in some sense are necessary for the lawyer to accomplish his or her mission.

Finally, the inquiry notes that the agency head may have been required under applicable law to produce the requested government files. This, too, is immaterial unless the government lawyer was authorized by law to communicate with the agency head without the need for consent by the latter's private counsel. *See Nai Cheng Chen v. INS*, 537 F.2d 566, 569 (1st Cir. 1976). This Committee has not considered whether the government lawyer in fact was so authorized, as it renders opinions only on the Code of Professional Responsibility. However, it is pertinent to point out that, in providing an exception for cases in which communications are authorized by law, DR 7-104(A)(1) refers to authorization for the lawyer's communication and not to authorization for communication by the *lawyer's* client. Thus, it may be that the government official who initiated the investigation in this case was authorized by law to require the agency head to produce the government records. It did not necessarily follow, however, that that by itself constituted authorization for the government lawyer to exercise the official's authority.

Inquiry No. 87-4-18
Adopted: February 21, 1989

Opinion No. 200

Retention of Attorneys' Fees Paid By Client From Proceeds of Embezzlement

• A lawyer may retain a fee paid with funds that are traceable to the client's embezzlement where the lawyer informed the client at the outset of the representation that she would not accept payment from money obtained illegally and she did not learn of the criminal source of the fee until the representation was substantially completed.

Applicable Code Provisions

- **DR 2-106(A)**(Illegal Fee)
- **DR 1-102(A)(3)** (Illegal Conduct)
- **DR 1-102(A)(4)** (Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation)

Inquiry

After being interviewed by law enforcement officers in connection with the embezzlement of funds from his employer, an individual consulted an attorney who agreed to the representation but stated that she would not accept payment of her fee from money obtained illegally. The client ultimately entered a plea of guilty to charges of embezzlement and during his sentencing proceedings it was disclosed that the attorney had been paid, without her knowledge, with funds that were directly traceable to the client's embezzlement activities. The employer's bonding company reimbursed the employer for its losses and then sought recovery from the attorney of the fees received. After the attorney refused to return the funds to the bonding company, its attorney requested the opinion of this Committee concerning the ethical propriety of the defense attorney's action in retaining a fee paid with the proceeds of the embezzlement.[1]

Discussion

The ethical issues raised by this Inquiry go to the heart of the lawyer's role in our criminal justice system. On the one hand an ethical rule under which lawyers would be required to forfeit fees earned in good faith could have a negative effect on the willingness of lawyers to represent persons charged with criminal activity. The presumption of innocence afforded all persons accused of crimes would mean very little if lawyers were unavailable to assist in the defense of the accused. On the other hand, numerous provisions of the Code recognize the lawyer's obligation to practice his or her profession within the bounds of the law; the specter of lawyers freely accepting fees paid with the fruits of unlawful activity, especially where the funds belong to another, is a view of the profession to which few would subscribe. At least on the facts of this case, the Committee finds that no ethical violation occurred when the lawyer, having learned for the first time at the completion of the representation that her fees had been paid with the proceeds of the client's illegal activity, nevertheless refused to return the fees to the victim of that activity.

Several provisions of the Code bear on the right of a lawyer to retain a fee paid with the proceeds of a client's illegal activity.

DR 2-106(A) provides that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." The Committee has previously indicated that an illegal fee includes one which exceeds a maximum amount set by statute, *see*, Opinion 11 (usurious interest charge), or which violates a statutory prohibition against charging fees for particular services, *see*, Opinion 184. DR 2-106(A) is directed at the conduct of the attorney in contracting for, charging and collecting a fee, not at the conduct of the client; if no provision of law makes it unlawful for an attorney to accept payment from tainted funds, the client's criminal conduct in obtaining the funds used to make the payment is simply outside of the scope of this Rule.

Similarly, DR 1-102(A)(3), under which a lawyer shall not [e]ngage in illegal conduct involving moral turpitude that adversely reflects on his fitness to practice law," does not apply in the absence of a specific criminal prohibition against the lawyer's acceptance of the fee.

Under DR 1-102(A)(4) a lawyer shall not "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation." An attorney who accepts a fee in violation of the criminal law is engaged in conduct involving "dishonesty." Even in the absence of a criminal prohibition, an attorney would be engaged in "dishonesty", "fraud" or "deceit" if he or she accepts a fee from tainted funds as a device to aid a client in avoiding forfeiture or in otherwise disposing of the funds. Under these circumstances the attorney's fee is a sham; it is not the result of an arms length agreement for the payment of services rendered or to be rendered.

[1] It is not the function of this Committee to determine whether the bonding company has a civil claim against the attorney for recovery of the embezzled funds. On the other hand, we will not avoid addressing an ethical inquiry simply becasue, as here, the same issue might arise under civil law.

There may well be other circumstances in which a lawyer's acceptance of a fee paid from an unlawful source would be regarded as dishonest, fraudulent or deceitful. Here, however, there was no dishonesty on the part of the lawyer. The lawyer made clear to her client that she would not accept the representation if her fee was to be paid from embezzled funds and she conducted the representation in the good faith belief that her fee had not been so paid. It was not until the case was substantially completed that she learned otherwise.

If a lawyer could be found to have violated the Code even though he or she accepted a fee and provided representation in good faith reliance on the client's statement as to its non-tainted source, few lawyers would be willing to take the risk of providing representation to persons charged with economic or similar crimes, thereby depriving the public of counsel in an area in which the right to counsel is fundamental. This Committee has construed the Code of Professional Responsibility as containing "an assurance of the public's right to counsel through the lawyer's right to practice," Opinion No. 35 (1977), and, in a different context, the Committee has held that the Code prohibits agreements "that prevent or unduly hinder clients from obtaining legal representation from attorneys of their own choosing ..." Opinion No. 181 (1987). These policies strongly counsel against the finding of a violation in this case.

The possibility of a lawyer's being deprived of his or her fee after the representation is substantially completed could also interfere with the lawyer's ability to zealously represent the interests of his or her client. If a lawyer, who has accepted a criminal representation in reliance on the client's statement that the lawyer's fee is not tainted, is ethically required to give up the fee if contrary information is later revealed, the lawyer, in order to avoid such a discovery, may be reluctant to investigate and the client may be reluctant to reveal all of the facts relating to the case. A principal goal of the Code is to promote complete openness between the lawyer and client. As EC 4-1 states, "A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system." These values would not be served if the lawyer here were ethically required to give up her fee after it was revealed that her client's prior statement regarding the untainted source of the fee was not in fact true.

The facts of this case present and the Opinion addresses only one of many situations in which a lawyer may learn that the funds used to pay his or her fee were derived from a client's criminal activity. The Committee expresses no view as to a lawyer's ethical obligation where, for example, the tainted source of a fee is disclosed by the client at the outset of the representation, nor do we address the circumstances, if any, under which a lawyer should inquire of the client concerning the source of a fee. These and other related issues will be addressed when presented in an appropriate Inquiry.[2]

Inquiry 82-5-8
Adopted February 21, 1989

Opinion No. 201

Fee Sharing Arrangement of a Lawyer Referral Service Operated by a Non-Profit Legal Services Organization

• A non-profit public interest legal services project ("the Project") serving poor and near-poor individuals in the District of Columbia operates a lawyer referral and information service as part of a "Hotline" program through which clients contact and may subsequently retain attorneys at reduced fees. The Project may contract with referral attorneys to receive a percentage (1/6th) of the total fee collected by the attorneys from clients referred to them through this service, in addition to a $15 referral fee, as part of the "usual and reasonable fees or dues charged by a referral service."

Applicable Code Provisions

• **DR 2-103(C)** (Solicitation of Professional Employment)
• **DR 2-106** (Fees for Legal Services)
• **DR 5-107(B)** (Avoiding Influence by Others Than the Client)

Inquiry

The Project asks the Committee's opinion on changes it wishes to make in how it charges attorney who are listed in its lawyer referral service. The Project provides legal services to the elderly poor and near poor in the District of Columbia. Much of its work is done through volunteer attorneys and volunteer non-attorneys who assist as paralegals.

The Project has instituted a "Hotline" service. Clients may call the Hotline number and speak directly to a Hotline attorney who is licensed to practice in the District of Columbia, and who has received specific training in the areas of law affecting this client population. Many of the calls are resolved by providing information and advice over the telephone, or by referring callers who have non-legal problems to the appropriate government agency or private Project. The remaining calls require more extensive legal work. If the caller's income is below a certain level, he or she may be eligible for free legal services provided by the Project's staff attorney. If the caller's income is above this level, he is ineligible for free legal assistance. To serve those clients who are ineligible for free legal assistance, the Project has implemented a lawyer referral service as an adjunct to its Hotline project. Through this service callers are referred to participating attorneys who have agreed to charge these clients reduced fees.

Before an attorney is listed in the referral service he or she enters into an agreement with the Project. The agreement provides that the attorney's "client" is the person referred by the Project, that the attorney shall at all times represent the client in a manner consistent with the D.C. Code of Professional Responsibility, and shall enter into a written fee agreement with the client disclosing the relationship between the attorney and the Project ("the Agreement").

The Project charges the client a $15 referral fee for the first half hour consultation which is collected by the attorney

[2] The issue of whether a lawyer may retain a fee paid with tainted funds has received much recent judicial attention as the result of the enactment of federal legislation allowing the assets of some defendants to be frozen after an indictment issues, *see, e.g., United States v. Monsanto*, 852 F. 2d 1400 (2nd Cir. 1988) (*en banc*), cert. granted, 109 S.Ct. 363 (1988), and a defendant's assets in the hands of third parties to be forfeited following conviction, *see, In Re: Caplin & Drysdale, Chartered*, 837 F. 2d 637 (4th Cir. 1988) (en banc), cert. granted, 109 S.Ct. 363 (1988). The legal issues presented under these statutes are distinct from the ethical issue addressed in this Opinion.

and remitted to the Project. Because this fee does not cover the cost of the referral service and Hotline, the Project now proposes to collect from the attorney 1/6th of the total fee collected from the client in addition to the referral fee. The question presented is whether this arrangement is acceptable under the Disciplinary Rules ("DR") of the D.C. Code of Professional Responsibility.

Discussion

DR 2-103(C) provides that:

> "A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his or her employment by a client, or as a reward for having made a recommendation resulting in his or her employment by a client, *except that he or she may pay* for public communication permitted by DR 2-101 and *the usual and reasonable fees or dues charged by a lawyer referral service*." (Emphasis added.)

Because virtually all lawyer referral services charge an initial consultation fee ("usual") and because $15 for a 30 minute consultation in this jurisdiction is clearly not high ("reasonable"), this DR would clearly permit the $15 initial consultation fee charged by the Project. We must determine if it also permits remitting a percentage of the attorney's fee charged by the attorney for ongoing legal services arising out of that initial interview, in light of DR 3-102's prohibition on a lawyer's dividing legal fees with non-lawyers except in three circumstances not relevant to this inquiry.

In Opinion 155 (1985), the Committee concluded that DR 2-103(C) permitted a fee sharing arrangement between a law firm and a "parent" organization -- through which the firm would provide legal services to organizations that were members of the parent organization -- provided that the fees remitted to the plan reasonably related to the actual costs incurred and services provided by the plan's parent Project. Here, we are informed that the fees will be used to pay for the actual costs of operating, conducting, promoting, and developing the Hotline and referral service component of the Project's legal services program. Such uses of proceeds derived from operating a lawyer referral service are also considered proper under Section 8.3(a) of the ABA approved *Statement of Standards and Practices for a Lawyer Referral and Information Service* (February 1984) ("ABA Standards"). The amount of fees remitted will represent "reimbursement" for services and bear a "reasonable relationship to the costs incurred and the services provided." Opinion 155. Thus, payment of a portion of a referral attorney's fee to the Project would be permitted as "reasonable" under DR 2-103(C) of the D.C. Code.

This case is distinguished from the inquiry in Opinion 155, where an issue was presented whether a pre-paid legal services plan represented a parent organization or its member organizations. Here it is clear that the attorneys will represent the individual clients referred to them, and not the referring Project. The contract Agreement between the Project and its listed attorneys defines "client" to mean "any person referred by the Project to the Attorney for legal services," and provides that "[t]he Attorney shall accept each Client who is referred to the Attorney and render prompt professional service to the Client." The individual referred to an attorney would, of course, make the final decision whether to accept the attorney as his or her legal representative. Under the arrangement proposed by the Project the attorney would pay the Project only a percentage of the fee actually collected from the client, thus keeping the Project out of the fee decisions made by the client and the attorney.[1]

Also unlike the situation described in Opinion 155, here the attorney agrees to charge at a reduced rate that will apply to all of the time the attorney spends on the matter, and not to a specified number of hours beyond which the attorney may charge full rates. In the Agreement the attorney agrees to charge no more than the fees set forth in the Agreement, but presumably could charge or collect from the client less than even this reduced fee.[2] Thus, it is unlikely that the client would be charged "an illegal or clearly excessive fee," as proscribed by DR 2-106.[3]

Conversely, of course, attorneys entering into Agreements with the Project to provide legal services at reduced rates should, as discussed in Opinion 30 (Feb. 22, 1977) in the context of prepaid legal services programs,

> "take adequate precautions to gauge the likely effect of the various factors that may influence the extent and value of the services he will be expected to render....to avoid...rendering sharply discounted services throughout the course of the arrangement, and thus possibly jeopardizing his ability to discharge his professional commitments..."

In addition to being "reasonable," the Project has represented that percentage fee arrangements, such as the one proposed here, are quite "usual" as a means of funding lawyer referral services, and are found in numerous bar sponsored or bar approved lawyer referral services operating throughout the country. In support of this contention it sent to the Committee an excerpt from the *Reference Handbook* (Fall 1983), of the American Bar Association's Lawyer Referral and Information Service, which lists approximately 44 different bar associations that have fee sharing arrangements with attorneys to whom they refer cases. These arrangements are very diverse, but in each case the association receives some percentage of some portion of the fee received by an attorney from a client referred to her or him by the association. We note that all of the services on this list appear to be bar-sponsored and none of them are from the District of Columbia or surrounding jurisdictions: for example, 20 of the associations listed are in California, five are in Florida, and five are in Illinois. Therefore, the Committee also looked at the fee arrangements in eight different lawyer referral services in Maryland and Virginia to determine if a percentage fee arrangement was "usual" in this area. All of the services charged an initial consultation fee to clients, as does the Project in this case. In addition, they each assessed the lawyers who list with service an annual dues amount. Three of the services, all in Maryland, collected a percentage of the fees received by the attorneys from

[1] Under the Agreement, however, the attorney must execute a written fee agreement with all clients that shall disclose, in language acceptable to the attorney and the organization, the relationship between the attorney and the organization, and shall request permission from the client to allow information about his or her case to be shared with the organization.

[2] The agreement provides, for example, that a contingent fee can be no more than 25 percent of any net award, that the attorney shall charge no more than $50 per hour for any legal services performed, and sets a maximum fee schedule for the preparation of simple wills.

[3] Section 8.1(a) of the ABA Standards provides that referral attorneys may pay "a registration fee, 'referral' fee (computed on a percentage basis or otherwise), or other like participating fee" or may remit to the lawyer referral service "the initial consultation fee, or any two or more of such fees, as a condition to panel membership."

the clients they referred to them: One association collects between 15 and 20% of fees over $1,150, another association receives 10% of all fees up to $5,000, and between 15 and 20% of fees above that amount, and a third association receives 5% of all fees above $100.

Thus, the fee sharing arrangement proposed by the Project could be considered both "reasonable" and "usual" within the meaning of DR 2-103(C). The arrangement presented here would also appear to be consistent with DR 5-107(B) which provides that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal service." Under the Agreement the Project does not claim or receive any right or ability "to direct or regulate the attorney's professional judgement." In fact, the Agreement specifically provides: "The Project shall not interfere with or control the performance of the duties of the Attorney to the Client."

In sum, the Project's Hotline and referral service is "operated for the benefit of the public." ABA Standards §1.6. It is not "designed to procure financial benefit or legal work for a lawyer as a private practitioner." Ethics Comm. Opinion 109 (Nov. 24, 1981). The Project represents that the purpose of this service is to make affordable legal services available to a needy population that might not otherwise be able to retain legal assistance. The referral service provides a convenient and effective means by which they may be referred, when necessary, to an appropriate member of the bar.

The proposed fee arrangement would help the Project defray the cost of providing this service. As described to us, the Agreement between the Project and the attorneys who join the referral service, of which the percentage fee arrangement would be a part, does not impair or control the independent professional judgement of referral attorneys, nor subject them to conflicting interests or divided loyalties. As such, the proposed percentage fee arrangement between the Project and attorneys who are listed in its lawyer referral services would not violate the applicable Disciplinary Rules.[4]

[4]This fee arrangement would apparently also be proper under Rule 7.1 of the Proposed Rules of Professional Conduct for the District of Columbia, now awaiting adoption by the District of Columbia Court of Appeals. Comment 8 of that rule states that a lawyer is permitted to "pay another person for channeling professional work to the lawyer" and that "a lawyer may participated in lawyer referral programs and pay the usual fees charged by such programs."

Inquiry 87-7-38
Adopted April 18, 1989

Opinion No. 202

Propriety Of A Contingent Fee In The Sale Of Literary Rights Where The Lawyer Also Provides Representation In The Underlying Matter

• A lawyer may not enter into a contingent fee agreement with a client regarding the sale of literary rights where those rights involve the subject matter of other ongoing or proposed employment of the lawyer by the client.

Applicable Code Provision

• **DR 5-104(B)** (Limiting Business Relations with a Client)

Inquiry

The inquirer represents an individual in several on going civil lawsuits involving matters of interest to the media. The client has requested that the inquirer also represent her in connection with the sale of the literary rights to her life story. The literary rights involve, in substantial part, the subject matter of the ongoing civil litigation. The proposed fee arrangement for the sale of the literary rights is a contingent fee of 5 percent of any negotiated cash advance for such rights.[1] The inquirer asks whether representing the client in connection with the sale of the literary rights during the pendency of the litigation violates DR 5-104(B) or any other ethical constraints.

Discussion

DR 5-104(B) states:

> Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

[1]No contingent fee or other interest in potential royalties is implicated by the inquiry.

This committee has never construed this disciplinary rule nor is guidance available from other jurisdictions regarding its meaning. Nonetheless, it is clear from its plain terms that DR 5-104(B) stands as a limited exception to the recognition that contingent fee arrangements are generally permissible in civil cases. *See, e.g.*, Opinion No. 115 where we concluded that contingent fees are generally permissible in non-litigation civil matters, subject to certain constraints. *See also* EC 5-7.

DR 5-104(B) broadly prohibits a lawyer from acquiring any "interest" in publication rights where those rights involve the subject matter of the ongoing or proposed employment by that lawyer. In this case, the subject matter of the lawyer's employment -- the underlying litigation -- embodies precisely those aspects of the client's life story to which she seeks to sell literary rights. The question presented is thus whether the proposed contingent fee arrangement regarding such sale would give the lawyer an interest in the publication rights which is prohibited by the rule.

It is the committee's view that a contingent fee in the sale of the literary rights is a prohibited "interest" under the terms of the disciplinary rule. While the term "interest" is not defined in the rule at issue, neither is it limited. A related rule, DR 5-103(A), which generally prohibits a lawyer from acquiring a "proprietary interest in the cause of action or subject matter of litigation he is conducting for a client" specifically sets forth reasonable contingent fees as an exception to the prohibition. The lack of such an explicit exception in DR 5-104(B) supports our view that the word "interest" should be read broadly to preclude a lawyer from taking any financial interest in the value of literary rights where there is ongoing representation in the underlying matter. Such an interest includes a contingent fee arrangement.

Further, sound policy considerations support this result. The value of the literary rights -- and hence the value of the contingent fee agreement -- is closely tied to the conduct of the underlying representation. As a result, permitting contingent fee arrangements in such circumstances implicates serious conflicts of interest between lawyer and client. Barring contingent fee arrangements in such cases is a fully appropriate policy choice made by the framers of the rules

even though we recognize that it may also have the effect of limiting a particular client's choice of counsel.

The same result is reached under the proposed rules of professional conduct. Indeed, the proposed rules and accompanying notes and history support the conclusion we have reached regarding the appropriate construction of DR 5-104(B).

Proposed Rule 1.8(c) closely parallels DR 5-104(B) as it states:

> Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

According to its drafters:

> Paragraph (c) [of Rule 1.8] is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.

The explanatory note to the proposed rule -- which is "substantially similar" to the current rule -- underscores that a lawyer may not enter into a contingent fee agreement regarding the sale of literary rights during the pendency of the underlying representation:

> [4] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures which might otherwise be taken in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5. [Rule 1.5 includes the requirements that fees must be reasonable.]

The lawyer is precluded from entering into a contingent fee arrangement in the case of simultaneous representation in both the underlying matter and the transaction involving the sale of the rights because of the "conflict between the interests of the client and the personal interests of the lawyer" which would likely arise. Thus the only time a lawyer may be paid through a contingent fee or other ownership share in literary media rights in connection with the sale of such rights is when the sale is the only subject of representation, assuming all other ethical requirements are met.

Inquiry No. 88-10-30
Adopted: May 16, 1989

Opinion No. 203

Employment as the Lawyer's Investigator of Union Representative who Refers Cases to the Lawyer

• Although there is no *per se* violation of the disciplinary rules when lawyers employ as investigators Union representatives who have referred cases to them, there are risks. The employment arrangement must not be a reward for referrals. When working for lawyers, investigators can do only those things which the lawyers themselves can legally and ethically do.

Applicable Code Provisions

• **DR 2-103(C)** (Solicitation of Professional Employment)
• **EC 3-6** (Delegating Tasks to Laypersons)
• **DR 7-102(A)(5), (7) & (8)**(Representing a Client Within the Bounds of the Law)
• **DR 7-104(A)(1)**(Communicating With One of Adverse Interest)

Inquiry

The inquirer, a personal injury lawyer who regularly uses the services of investigators to assist him in preparing cases, asks about the propriety of hiring as an investigator in a case of a worker injured on the job the union representative who referred the fellow worker to him for legal advice. The inquirer proposes to pay the union representative an hourly rate plus expenses as is the custom for investigators. In particular, the inquirer asks whether an employment contract with the union representative who refers the case might be construed as an illegal finder's fee.

Discussion

The requirement of DR 2-103(C) that a lawyer shall not compensate or give anything of value to a person to recommend or secure his or her employment by a client, or as a reward for having made a recommendation resulting in his or her employment by a client (with some exceptions not applicable here), mandates that the employment of an investigator not be a reward for the referral of a case. However, the rule does not prohibit the employment of persons who have referred cases. DR 5-107(B) provides that a lawyer shall not permit one who recommends him to render legal services for another to direct or regulate his professional judgment in rendering legal services.

Thus, if the inquirer employs as an investigator a union representative who has referred cases to him, the employment should not be contingent on the referral of cases. In each case requiring investigation, the lawyer should exercise independent judgment about who to employ as an investigator and not give preference to the union representative who referred the case because he referred the case.

In any on-the-job injury case investigated for the lawyer by a union representative employed by the same company or agency as the client, special care must be taken to avoid confusion of roles. The lawyer supervising the investigation must be vigilant that the investigator's allegiances to the union or to the company do not prevent him from conducting a diligent investigation for the client and preserving the secrets of the client. The hours paid for by the lawyer and the work product of the investigation must be used for the benefit of the client. *See State Farm Mutual Auto Insurance Co., v. Walker*, 382 F.2d 548, 522 (1967) (unethical for lawyer who represented insured to use insured's statement when advising insurance company on what action to take against insured), *cert. denied*, 389 U.S. 1045 (1968).

Since the investigator may be known to others in the workplace in a role other than investigator, the lawyer must also be vigilant in ensuring that the investigator does not misrepresent his role or take actions which the lawyer could not legally or ethically take. In Opinion No. 93, this Committee quoted with approval the warning in ABA Formal Opinion 316 (1967) that

> we do not limit the kind of assistants the lawyer can acquire in any way to persons admitted to the Bar, *so long as*

the nonlawyers do not do things that lawyers may not do or do things that lawyers only may do (emphasis added).[1]

The inquirer notes that hiring the union representative as his investigator "has certain advantages because the union representative has access to information that would be extremely helpful."[2] We presume that the special "access" is merely one of familiarity with the people and issues. We remind the inquirer, however, that the investigator, when he approaches other employees, must identify his role as an investigator for the lawyer representing a claimant or potential claimant. Our prior Opinion No. 129 specifically admonishes that before conducting interviews of employees of a party, a lawyer or his agent must disclose the fact that he represents a party who has a claim against the employee's employer. A lawyer cannot use the union representative/investigator to obtain information not lawfully available to the lawyer. Under DR 1-102(A)(4) a lawyer must not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Moreover, DR 7-102 provides in pertinent part that a lawyer shall not"[k]nowingly make a false statement of law or fact," (A)(5), or "[k]nowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule,"(A)(8).

Special care should also be exercised to ensure that the moonlighting investigator does not communicate on the subject of the case with the potential defendant who may also be his employer in violation of DR 7-104(A)(1) which provides that a lawyer shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer unless he has the prior consent of the lawyer representing such other party."

This Committee was asked for an opinion on the applicability of the disciplinary rules to a lawyer's employing the Union representative who has referred cases to him and concludes that such a practice is very risky, but would not in all circumstances be prohibited by the disciplinary rules.

Inquiry No. 88-9-26
Approved June 20, 1989

Opinion No. 204

Participation in Agency Rulemaking

• A law firm that represents clients before an administrative agency is not, as a general matter, ethically precluded from submitting comments on its own behalf regarding a notice of proposed rulemaking by the agency. However, the firm cannot ethically submit any comments to the agency if, (a) at the time the comments are submitted, the inquirer represents clients regarding applications that are then on file at the agency or that the clients have advised the inquirer they have decided to file, and (b) the inquirer's comments, if adopted by the agency, could prejudice any such application.[1]

Applicable Code Provisions

• **DR 7-101(A)**(Zealous Representation of Clients)
• **EC 7-17; 8-1; 8-2; 8-4**

Inquiry

An administrative agency has an application procedure whereby, reduced to its bare essentials, applications are submitted to the agency; the agency reviews the applications for procedural correctness, accuracy, and completeness; the applications that pass muster are designated for hearings; discovery is undertaken; and the applications are adjudicated in a trial-type hearing. The time from filing through adjudication, however, is normally at least several years, not including administrative and judicial appeals.

Because of this administrative logjam, among other reasons, the agency issued a Notice of Proposed Rulemaking ("NPRM") that proposes several major substantive and procedural changes to simplify and shorten the administrative process. The NPRM notes the considerable existing backlog of applications, and one of the issues on which it requests comment is the extent to which any proposals should be retroactively applied.

The inquirer, a law firm that represents numerous clients that have filed applications with the agency, states that some of its clients would benefit from some or all of the proposed changes, while others would be adversely affected thereby. The inquirer desires to submit comments to the NPRM on its own behalf, as a member of the public (but not on behalf of any client)[2], and asks if it can ethically do so.

Discussion

Just as the changes proposed in the NPRM, if applied to the inquirer's clients, would affect some beneficially and others adversely, the Committee assumes that the inquirer's proposed comments to the NPRM, if applied to the inquirer's clients, would affect some beneficially and others adversely. Thus, this inquiry relates to the interaction between a lawyer's obligation under DR 7-101(A) to represent clients zealously, on one hand, and a lawyer's Canon 8 obligation to assist in improving the legal system, on the other hand.

Because Canon 8 contains no disciplinary rules that are applicable to this inquiry, it is necessary to look to the ethical considerations under Canon 8 for guidance. EC 8-1 provides:

> Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system [footnote omitted]. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system [footnote set forth in part below] without regard to the general interests of desires of clients or former clients [footnote omitted].

Similarly, EC 8-2 states, in pertinent part:

[1] A similar statement is included in the Proposed Rules of Professional Conduct 5.3(b) which would require a lawyer to make reasonable efforts to ensure that a lay investigator's conduct is compatible with the professional obligations of the lawyer.

[2] We presume that this inquirer has considered the disadvantage that if the investigator is called as a witness he will be cross-examined about his referral of cases. In some cases, such a disadvantage might be so detrimental to the client that hiring the Union representative as an investigator would violate Canon 6.

[1] The Committee also reaches all of the conclusions herein under Proposed Rules 1.7 and 6.4 of the proposed Rules of Professional Conduct dated September 1, 1988.

[2] Because the law firm will be submitting the comments on its own behalf, its comments must clearly so state, in accordnace with EC 8-4.

> ...If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate change in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded [footnote set forth below]. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

On the other hand, DR 7-101(A)(3) provides, in pertinent part:

> A lawyer shall not intentionally...(3) Prejudice or damage his client during the course of the professional relationship [with exceptions not relevant here].

This strong language would appear, on its face, to impose an absolute obligation, other than the stated exceptions, not to "prejudice or damage" one's client "during the course of the professional relationship." There is no provision that permits the client to waive the protections of DR 7-101. EC 7-17, however, clarifies the meaning of "during the course of the professional relationship" of the purposes of Canon 8:

> The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client [footnote set forth below]. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client *in a matter he is then handling*, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client (emphasis added).[3]

Based upon EC 7-17, the Committee concludes that the inquirer is not necessarily ethically precluded from submitting comments to the NPRM. Lawyers do not completely sacrifice their First Amendment rights by representing clients. Moreover, aside from the members of the agency itself, the applicants and the law firms that represent them before the agency are obviously among the most experienced and knowledgeable persons regarding the agency's process[4] -- in addition to being among the most likely to submit comments to the NPRM -- and their comments would clearly contribute to the NPRM process, consistent with the entreaties of Canon 8.

However, consistent with this limitation in EC 7-17 to "a matter he is then handling," the Committee concludes that in situations in which, *at the time comments are submitted*, the inquirer represents clients regarding applications that (a) are then on file at the agency or (b) the clients have advised the inquirer they have decided to file, the inquirer cannot ethically make the comments if the comments, if adopted, could prejudice any such applications.[5] On the other hand, this Committee held in Opinion No. 57 (1978) that a lawyer representing clients before an administrative agency may make financial contributions to a public interest law firm that also practices before that agency, even if the public interest law firm espouses positions that may be adverse to the lawyer's clients, provided that the contributions are not for a specific matter in which the lawyer's client is an adverse party. By analogy in the instant inquiry, if applications that the client may in the future decide to file could be adversely affected by the inquirer's comments (if adopted), the inquirer's submission of the comments would not create an ethical problem as to those applications.[6]

Inquiry No. 89-4-18
Adopted: July 19, 1989

Opinion No. 205

Joint Dismissal of Cross-Appeals of an Uncontested Divorce

• The practice whereby both parties to an uncontested divorce action file and summarily dismiss cross-appeals of the decree, thus allowing the decree to become final without waiting for the expiration of the sixty-day appeal period, does not violate the Code of Professional Responsibility.

Applicable Code Provisions

• **DR 1-102(A)(5)** (Conduct Prejudicial to the Administration of Justice)

Inquiry

In the District of Columbia, a divorce decree apparently is not final until the sixty-day appeal period has run, even in uncontested divorce actions. In some instances, counsel in divorce cases conclude that it is in their clients' interest to have the divorce become final before the appeal period has run, e.g., for tax purposes a final divorce decree may be sought before the year's end.

To avoid the delay in finality caused by the appeal period, a practice has developed under which both parties to a divorce file cross-appeals of the uncontested divorce decree and then immediately dismiss the appeals with prejudice. Because there no longer is a right to appeal, the decree is treated as final. The inquirer states that this practice is widely used, with the knowledge of the staff of the Superior Court Family Division Clerk's Office. The inquirer asks whether this practice is contrary to the disciplinary rules.

Discussion

At issue in this inquiry is whether is it ethically permissible for a lawyer to file an appeal solely as a procedural expedient, with no intention of pursuing an appeal based on the merits. In the circumstances presented by this inquiry, the Committee finds no basis under the Code for prohibiting such action by lawyers who represent parties to an uncontested divorce.

In reaching this conclusion, the Com-

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[3] The footnote to EC 7-17 includes the following example:

> No doubt some tax lawyers feel constrained to abstain from activities on behalf of a better tax system because they think that their clients may object. Clients have no right to object if the tax adviser handles their affairs competently and faithfully and independently of this private views as to tax policy. They buy his expert services, not his private opinions or his silence on issues that gravely affect the public interest.

[4] As stated in the footnote to EC 8-2:

> The special obligation of the profession with respect to legal reform rests on considerations too obvious to require enumeration. Certainly it is the lawyer who has both the best chance to know when the law is working badly and the special competence to put it in order.

[5] In view of the uncertainty of the extent of retroactivity, the inquirer must assume the possibility of complete retroactivity in determining whether prejudice would result to its clients if the inquirer's comments were adopted.

[6] The Committee notes, however, that the inquirer may be precluded from commenting *at all* regarding the issue of retroactivity because the inquirer has some clients who would prefer the old guidelines and others who would prefer the proposed guidelines. Thus, comments favoring retroactivity could adversely affect the clients whose applications would fare better under the old guidelines, while comments against retroactivity (or recommend that existing applicants be permitted to amend their applications if there is retroactivity) could adversely affect the clients whose applications would fare better under the proposed guidelines.

mittee considered the fact that the parties have agreed between themselves to file cross-appeals to expedite a process that, for the clients' purposes, is too time-consuming. The practice apparently is done not to serve any evil purpose or to effect a ruse upon the court. Rather, the parties have chosen to avail themselves of what they see as the only means at their disposal to expedite a final decree in their uncontested divorce. It further is done with the knowledge, if not the blessing, of the Clerk's Office.

By its nature, the uncontested divorce procedure is intended to simplify the divorce process. There is a presumption that persons who seek this type of divorce have agreed to its terms. Therefore, a sixty-day appeal period, during which time the decree is not final, seems to be at odds with the purposes to be served in seeking an uncontested divorce; logically, an appeal period should not be necessary.[1] Thus, filing and summarily dismissing cross-appeals can be viewed as a harmless procedural expedient that removes the bite of an apparently unnecessary legal requirement as it applies to uncontested divorces. Further, the practice works only if both parties cooperate, and it does not appear to waste significant judicial resources.

The only basis for objecting to this practice would be on the grounds that it is "conduct prejudicial to the administration of justice." In this instance, the appeal process is being used to gain a procedural advantage, with no intent of having a substantive issue decided on appeal, the usual purpose in noting an appeal. However, we do not see how the "administration of justice" is prejudiced by the practice at issue in this inquiry.

Inquiry No. 89-1-1
Adopted: September 19, 1989

Opinion No. 206

Lawyer's Obligation to Return Former Client's Documents to the Former Client or Dispose of Former Client Files in a Manner that Does not Prejudice the Former Client's Interests.

[1] This is not to suggest that normally available remedies to challenge a judgment in an uncontested divorce are foreclosed. *See, e.g.*, Superior Court Civil Rule 60(b).

Applicable Code Provisions

- **DR 1-102(A)(5)** A lawyer shall not engage in conduct prejudicial to the administration of justice.
- **DR 2-110(A)(2)** A lawyer, upon withdrawal from employment, shall deliver to the client all papers and property to which the client is entitled.
- **DR 7-109(A)** A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.
- **DR 9-103(B)(4)** A lawyer has a duty to return to the client all funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Inquiry

The inquirer is a sole practitioner who requests the Committee's opinion on the length of time he "should keep dead files of clients." The inquiry relates to "dozens and dozens" of files concerning former clients with whom the attorney does not now have any contact. Most of the files are from the period 1972-1977. The files include documents received from the clients, as well as notes and memoranda prepared by the attorney. Some of the former clients are individuals who are or may be deceased, and at least one is a corporation that no longer exists. The inquirer has represented that to the best of his knowledge none of these documents is the subject of pending or imminent litigation.

Discussion

This inquiry presents an issue faced by many lawyers and law firms: how to dispose of documents, files or property in their possession which relate to the representation of former clients, "after the matters have terminated and the files have been closed or retired."[1] American Bar Association Committee on Ethics and Professional Responsibility, Informal Opinion 1384 (1977) ("ABA Informal Opinion 1384") at 1. Although ABA Informal Opinion 1384 correctly notes that "[h]ow to deal with the burden is primarily a question of business management, and not primarily a question of ethics or professional responsibility," *id.*, ethical issues are raised by this dilemma, and we address them in this opinion.

[1] When, if and how to discard former client files, or send them to the former client or his or her current lawyer, is an important issue to consider before the termination of a representation. In at least one case a party was ordered to produce all documents held by each law firm that had represented it in prior, similar but unrelated litigation. *Dickey v. Gulf Oil Corp.*, 32 ATLA L. Rep. 296 (Chatham Cty. Ga. Superior Ct., Order of Jan. 24, 1989).

The materials that may be found in a lawyer's closed client files can be divided into at least three categories: valuables that are the property of the client, client documents and other property, and the lawyer's work product. This division is not, however, dispositive of the issues presented. In our Opinion 168 (April 15, 1986) we concluded that a lawyer must provide to his former client's current lawyer all materials generated during the course of the previous representation except where it can reasonably be concluded that withholding any such materials will not result in foreseeable prejudice to the former client. We noted that:

> "[T]he real issue is the lawyer's responsibility to his former client. While there may be some debate (and indeed some legal uncertainty) over property rights in various materials, the property concept does not necessarily determine the ethical responsibilities or obligations of a lawyer. A lawyer must obviously return to his former client upon demand any property of that client. The more complex question involves the client's right to material that may not be, in a traditional legal sense, the client's 'property.'"

Id. Where the question is how to dispose of material in closed client files, the overriding concern must also be the lawyer's responsibility to avoid prejudice to the former client, and not the former client's property interest in any particular document or item. Other bar association ethics committees which have examined this question have reached similar conclusions.

The Committee on Professional and Judicial Ethics of the Bar Association of the City of New York concluded that a former client's records and documents which are not required to be kept by statute or court rule should be returned to the client or destroyed according to the client's instruction, and that absent instructions, the files should be kept by the lawyer for as long as is necessary to safeguard a client's foreseeable interests. Opinion 82-15 (Feb. 6, 1985). The Committee noted that the New York State Bar, in its Opinion 460 (1977), had concluded that:

> "The keystones to document preservation are the attorney's responsibility

to 'safeguard the interests of his client,' EC 6.4, and the foreseeability of future need for the documents. 'As to those kinds of records that the law does not require be preserved, the length of time for which they should be retained may be determined simply on the basis of the client's instructions or, absent such instructions, on the basis of foreseeable need.'"

and quoted with approval the following language from Opinion 460:

"'Those files and records that do not contain material for which the client or his estate foreseeably will have need, may be destroyed where they have been retained for a reasonable period of time after the lawyer has requested instructions for their disposition from his client, or his client's legal representative, and such instructions have not been received.'"

The Professional Guidance Committee of the Philadelphia Bar Association has issued a number of opinions on this subject. In its recent Opinion 88-17 (May 16, 1988), responding to an inquiry from a law firm which wanted guidance as to the disposition of a large number of client files for which a lawyer no long with the firm had been responsible, the Committee concluded:

"In general, you should return files to the client, destroy all the files in accordance with the clients' instructions or, if you are unable to locate the client or do not obtain any instructions, you should keep the files for as long as you believe it necessary to safeguard the clients' foreseeable interests. *In other words, the handling of the file totally depends upon the nature of the case, the contents of the file and your ability to contact the client.*" (Emphasis added.)

In its Opinion 87-51-T, responding to an inquiry about whether there was a specific time limit for holding on to a closed file, the Committee "[i]ndicated that there was no specific rule, and that each case had to be decided on a case-by-case basis, being careful not to prejudice the client by destroying information that the client might need." In its Opinion 85-150 (Dec. 31, 1985), the Committee stated: "In the opinion of the Committee, there is no standard time for which an attorney ought to keep any particular file. Such files must be maintained as long as necessary to safeguard the clients' foreseeable interests." See also, Phil. Bar Assn., Professional Guidance Committee Opinions 86-61, 82-81, 79-108 and 78-77.

I. Valuable Property

The disposition of client funds, securities or other property of value in a lawyer's possession is specifically addressed by Disciplinary Rule ("DR") 9-103(B)(4),[2] which provides that a lawyer shall:

"(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive."

The Proposed Rules of Professional Conduct, published on September 1, 1988, would also require lawyers to safeguard the funds of clients or third persons in their possession. Proposed Rule 1.15(b) provides:

"(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, *a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive* and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6." (Emphasis added.)

A corollary of this duty to would be the obligation to safeguard such property until it can be returned to its owner or the owner's lawful representative or successor.

II. Other Client Property

Property in this category would include originals of documents provided to the lawyer by the client and other documents or material in the lawyer's possession which are the client's property. While no present DR speaks generally to the question of how a lawyer should dispose of such material when his representation of the client has ended, DR 2-110(A)(2) does address the problem that arises when a lawyer "withdraws" from employment.[3] It provides that:

"[A] lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, *delivering to the client all papers and property to which the client is entitled*, and complying with applicable laws and rules." (Emphasis added.)

In ABA Informal Opinion 1384 the ABA's Committee on Professional Ethics and Responsibility has noted:

"*Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client.* Such items include those furnished to the lawyer by or on behalf of the client, the return of which could reasonably be expected by the client, and original documents (especially when not filed or recorded in the public records)." (Emphasis added.)

Id. at 2.

Applying DR 2-110(A)(2) and the Proposed Rule 1.16(d), we therefore conclude that upon the termination of a representation or the closing of a matter, a lawyer should attempt to return to a client or its legal representative all of the client's materials, or reach agreement with the client about the disposition of such materials. This should be done as soon as possible, because after the passage of time and the loss of contact or communication with the former client, the disposition of such materials can be-

[2] DR 9-103(B)(1) through (3) provides that a lawyer shall:

"(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

"(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safe-keeping as soon as practicable.

"(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possesion of the lawyer and render appropriate accounts to his client regarding them."

[3] The Proposed Rules of Professional Conduct would apply this requirement to "any termination of representation." Proposed Rule 1.16(d) provides:

"In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonably notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled* and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by rule 1.8(i)." (Emphasis added.)

Proposed Rule 1.8(i) provides:

"A lawyer shall not impose a lien upon any part of a client's file, except upon a lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the client's work product would represent a significant risk to the client of irreparable harm."

come as complicated as their retention is expensive.

There can, however, be no general answer to the question of how long these files should be retained, and we are not aware of any bar association that has attempted to define a specific length of time to hold documents from closed client files. *E.g.* Kentucky Bar Association Ethics Committee Opinion E-300 (Jan. 11, 1985) (a lawyer should use discretion in determining how long closed or dormant files should be kept). The length of time a lawyer must hold such files or documents will necessarily vary, depending on the particular facts of each client relationship and the materials at issue.

> "In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matter that can be expected to arise."

ABA Informal Opinion 1384 at 2.

III. Attorney Work Product

Closed client files also contain notes, memoranda, pleadings and other items prepared by the lawyer and research files of opinions, articles and other publicly available material which do not clearly or probably belong to the former client. As to these documents, the lawyer must first determine whether there is a legal obligation to preserve them and, if not, whether their destruction would prejudice the former client for whom they were obtained or prepared. *See* Opinion 168 (April 15, 1986.) This determination will in some instances not require prior consultation with the former client.

Each lawyer must determine whether he or she has any statutory or other legal obligation to preserve any documents in his client files. In Opinion 119 (March 15, 1983), we responded to a request from a lawyer who wished to discard memoranda he had prepared and presented to his client which he believed were protected by the attorney-client privilege, but which had been ordered produced in one case and might be ordered produced in other cases, and concluded that:

> "Intentional destruction of attorney memoranda which the attorney knows may be the subject of discovery or subpoena in pending or imminent litigation is conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5). In the absence of pending or imminent litigation, whether destruction of such memoranda violates any Disciplinary Rule depends on '(1) whether there is a legal obligation to preserve the memoranda or (2) whether the destruction of the memoranda would prejudice the client.'"

In addition, while "a lawyer does not have a general duty to preserve all of his files permanently...clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers' files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed, to the clients' detriment." ABA Informal Opinion 1384 at 1. Thus,

> "A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired.
>
> "A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer."

Id. at 2. If however, the attorney is under no present legal obligation to preserve the documents, and the former client would not be prejudiced by their destruction, destruction of these documents would not violate DR 7-102(A)(3) or (A)(7), or DR 7-109(A).

Other documents in a client file may not fit neatly or entirely into any of the categories discussed above. For example, client files may contain items obtained from third parties through pre-trial discovery of FOIA requests. The overriding concern in every case, however, is whether, in the absence of an agreement with the former client, the documents must be retained by the lawyer for an additional period of time to avoid any foreseeable prejudice to the former client. A lawyer has a legitimate interest in purging his or her files of retired or inactive material, but also an obligation to prevent the premature or inappropriate destruction of such material that could result in foreseeable prejudice to a former client.

Conclusion

We conclude that DR 9-102(B)(4) and Proposed Rule 1.15(b) require a lawyer to "promptly deliver" to the client, funds, securities or other items of value belonging to the client which are in the lawyer's possession at the termination of a representation, absent some written agreement between the lawyer and client authorizing an alternative disposition of these items.

We also conclude that as to those documents in a lawyer's possession "to which the client is entitled" and which the lawyer is under no legal requirement to retain, absent a written agreement between the lawyer and former client as to the disposition of these materials, DR 2-110(A)(2) and Proposed Rule 1.16(d) require that before disposing of this material a lawyer must make good faith efforts to contact the former client to determine whether the former client wants this material held by the lawyer, returned or destroyed. If good faith efforts to contact the client or its successor in interest or legal representative are unsuccessful, the lawyer must determine whether the client's interests require the preservation or retention of the documents for an additional period of time before disposing of them.

As to documents which the lawyer prepared or used during the course of the representation which the lawyer now wishes to discard, we conclude that DR 1-102(A)(5) requires that before discarding this material the lawyer should determine that there is no legal obligation or pending litigation for which the documents should be retained and no foreseeable prejudice to the former client will result from the destruction of this material, either because copies have previously been given or are otherwise readily available to the former client, or the former client has no reasonable expectation that this material will be preserved.

As a general matter we recommend that lawyers discuss and come to some agreement with their clients as to the disposition of material in the client's file at the conclusion of the representation. In the absence of any such an agreement, we recommend that before disposing of any material in closed client files lawyers should attempt to contact their former clients, in writing, to advise them that this material is about to be discarded, and give them an opportunity to request an alternative disposition.

Of course,"[i]n disposing of a file, a lawyer should protect the confidentiality of the contents," DR 4-101; ABA Informal Opinion 1384 at 2, and the lawyer "should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of." *Id.*

Inquiry No. 88-10-29
Adopted October 17, 1989

Opinion No. 207

Settlement Offers in Public Interest Litigation Conditional On Waiver Of Statutory Fees

• In light of the Supreme Court's decision in *Evans v. Jeff D.*, the Committee's Opinion 147 is modified insofar as the Committee held that it is unethical per se for an attorney representing a defendant in a Title VII action, or other similar action in which statutory fees are provided, to condition an offer of settlement upon the plaintiff's waiver or reduction of attorney's fees. The ethical considerations identified in Opinion 147 remain relevant, however, in determining, on the particular facts of a case, whether a negotiated fee waiver is improper. A fee waiver demand may still be unethical if the defendant has no basis for the proposal other than to deter similar future actions or to avoid payment of a fee to which the plaintiff is clearly entitled.

Applicable Code Provisions

• **DR 1-102 (A)(5)** (Conduct Prejudicial to the Administration of Justice)

Background

In Opinion 147 (Jan. 22, 1985), this Committee addressed the ethical issues raised when counsel for a defendant in a Title VII action, or other action involving a statutory basis for fee-shifting, conditions an offer of settlement upon the plaintiff's attorney's acceptance of no or a reduced attorney's fee. The Committee concluded that such an offer of settlement may be unethical under the District of Columbia Code of Professional Responsibility.

On April 21, 1986, the Supreme Court of the United Stated issued its decision in *Evans v. Jeff D.*, 475 U.S. 717, *rehearing denied*, 476 U.S. 1179 (1986), holding that a district court may, in its sound discretion, refuse to award attorney's fees under 42 U.S.C. §1988 when a case has been settled by a consent decree granting prospective relief to the plaintiff class but providing that the defendants shall not pay any part of the prevailing party's fees or costs.

Following the decision in *Jeff D.*, the Committee was requested to modify or withdraw Opinion 147. Although the issue was considered by the Committee, no action was taken. A formal Inquiry has now been received which requires the Committee to address the effect of *Jeff D.* on Opinion 147 and we do so to the extent required by the Inquiry.

Inquiry

The Inquiry is submitted jointly by counsel for an agency of the U.S. government and for a public interest organization . In 1988, the agency promulgated a final rule to control the emission of certain substances into the air. The public interest organization, which had participated in the rulemaking proceeding, filed a petition for review in the Court of Appeals in which it intended to argue that the regulations were deficient because they did not contain sufficient restrictions on production of the substances in question. As relief the petitioner intended to seek an order compelling the agency to undertake rulemaking with respect to additional controls on the substance under a court specified schedule. The agency had previously issued an advance notice of proposed rulemaking contemplating additional restrictions, but the notice contained no schedule for proposal or promulgation of additional regulations. The public interest group was represented in the appeal solely by an in-house staff attorney.

Before the case was briefed on appeal, the parties agreed to a settlement under which the agency agreed (i) to issue a notice of proposed rulemaking, or present a basis for a proposed decision to take no action, by a date certain; (ii) to promulgate final regulations, or present a basis for a final decision to take no action, by a date certain; and (iii) to file at six month intervals a written report with the court and the parties on the status of the agency's implementation of the agreed rulemaking schedule. The parties then jointly moved the court of appeals to stay the appeal pending implementation of the agreement, which motion was granted. The agency contends that the rulemaking schedule in the settlement agreement tracked an already existing internal schedule devised by the agency. The public interest group claims that there is no evidence that such an internal schedule existed and that, in any event, the settlement agreement insured compliance with any voluntary internal plan in existence.

The environmental statute under which the petition for review was filed provides for the discretionary award of attorney's fees to the prevailing party. The petitioner initially proposed a provision reserving the group's right to apply for attorney's fees if the parties could not subsequently agree on an award. Counsel for the group also informed government counsel that the fee request would be small (under $3,000) because of the early stage of the appeal. The agency proposed to include a provision in the settlement under which each party would bear its own costs, including attorney's fees, and indicated that it would not reach a settlement without such a waiver on the petitioner's claim to attorney's fees. The future status of the Advance Notice of Proposed Rulemaking was not discussed at this time.

After counsel for the public interest group raised the ethical propriety of the proposal under the Committee's Opinion 147, it was decided to submit the settlement to the Court of Appeals without any provision concerning costs and fees. The parties agreed, however, to submit an inquiry to this Committee. If the Committee concludes that the agency's fee waiver proposal was ethical, the settlement will be reformed to provide that each party will bear its own costs; if the Committee finds the proposal to be unethical, the settlement will remain silent as to costs and fees, and the petitioner will be free to litigate its claim. The merits settlement is not, however, contingent on resolution of the attorney's fees issue.

Discussion

I. Opinion 147

In considering the ethical issues raised by settlement offers conditioned on fee waivers, Opinion 147 noted that under DR 5-101(A), plaintiff's counsel "owes undivided loyalty to the client and is obliged to exercise his judgment in evaluating the settlement free from the influence of his or her organization's interest in a fee." Where the attorney has agreed to look to the defendant for his or

her fee, and the client has no obligation or is unable to pay the fee, an offer of settlement providing favorable substantive terms but conditioned upon the waiver or reduction of attorney's fees "can put plaintiff's counsel into a position in conflict with his or her client," with the attorney unable to resist the offer as a matter of ethics and the plaintiff having no interest to resist. Such a situation, the Committee believed, "could seriously undermine the effectiveness of [the fee shifting] provisions as a devise for making counsel available to persons having claims under [the civil rights and similar] statutes."

Based on these practical effects, Opinion 147 reached three conclusions concerning the ethics of settlement offers that are conditioned on the waiver or reduction of attorney's fees. First, relying primarily on DR 1-102(A)(5), under which "[a] lawyer shall not...[e]ngage in conduct that is prejudicial to the administration of justice," and EC 2-25, which directs every lawyer to support efforts to make counsel available to those unable to afford it, the Committee held that it is unethical for defense counsel to condition an offer of settlement upon an agreement by plaintiff's counsel to waive or limit the plaintiff's potential statutory fees. On the other hand, in order not to inhibit settlements of civil rights and other cases, the Committee held that an attorney representing a defendant in a Title VII action, or other action in which statutory attorney's fees are provided, may offer a single sum in settlement of the claims against the defendant for both damages and attorney's fees. Finally, we held that a plaintiff's attorney who receives a settlement offer, including an offer made in violation of the defense attorney's ethical obligation, should still transmit the offer to his or her client.

II. Evans v. Jeff D.

Evans v. Jeff D. was a civil rights action on behalf of a class of children in the State of Idaho who had been placed in the care of the State because they suffer from emotional and mental handicaps. Their complaint alleged that inadequate educational programs and health care services provided by the State violated the United States and Idaho Constitutions, four federal statutes and the Idaho Code. The complaint requested a mandatory injunction directing the State to improve these programs and services, and for an award of costs and attorney's fees, but it did not seek damages. Plaintiffs and their class were represented by an attorney employed by the Idaho Legal Aid Society, Inc.,[1] a private, non-profit corporation that provides free legal services to qualified low-income persons. There was no agreement requiring the plaintiffs to pay for the costs of litigation or the legal representation provided to them.

Shortly before trial was to begin, the State presented an offer of settlement which in the view of plaintiffs' counsel contained all of the injunctive relief sought in the complaint and was more than the district court had previously indicated it was willing to grant. The offer, however, was conditioned on the plaintiffs' waiver of their claim to costs and attorney's fees. Although plaintiffs' counsel signed the stipulation of settlement containing the fee waiver, when it was submitted to the district court for approval under Rule 23 (e), F.R. Civ. P., he requested the court to disregard the waiver of costs and fees on the ground that the State had exploited the attorney's ethical duty to his clients and that he had been forced to accept the offer, including the waiver. The district court rejected this argument and approved the negotiated settlement including the fee waiver. The Court of Appeals for the Ninth Circuit reversed, holding that attorney's fees should not, in the absence of unusual circumstances, be part of the settlement negotiations of class actions because of the potential conflict between the interests of counsel and of the class and because the federal policy embodied in the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, normally requires an award of attorney's fees to prevailing plaintiffs.

According to the Supreme Court, the issue presented in the case was whether a district court has a duty to reject a proposed settlement because it includes a waiver of statutory attorney's fees. Such a duty, the Court believed, must derive ultimately from 42 U.S.C. §1988, "rather than from the structure of professional ethics." 475 U.S. at 727. Finding no indication in the civil rights statute's text or legislative history that Congress intended to forbid all waivers of attorney's fees, the Court concluded that no flat prohibition against fee waivers is embodied in the statute. In reaching this conclusion, the Court rejected the contention that the allowance of settlement offers conditioned on fee waivers is at odds with the purpose of 42 U.S.C. §1988 to attract competent counsel to represent citizens deprived of their civil rights. Instead, the Court found that a general prohibition against negotiated fee waivers "would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement." 475 U.S. at 732. With respect to the concern, implicit in our Opinion 147, that negotiated fee waivers would reduce the pool of attorneys willing to represent plaintiffs in claims under fee-shifting statutes, the Court stated that there is no "reason or documentation to support such a concern at the present time," and that "as a practical matter the likelihood of this circumstance arising is remote." 475 U.S. at 741 n. 34.

III. Opinion 147 Revisited

At the heart of Opinion 147 was the Committee's belief that settlement offers conditioned on a plaintiff's waiver of attorneys' fees would undermine the effectiveness of the civil rights statutes and would in the long run prejudice a vital aspect of the administration of justice. While the Committee continues to believe that these concerns are real, we do not believe it is appropriate to maintain a rule of ethics, on which charges of professional misconduct may be based, where the Supreme Court has found that the legislative purposes of fee-shifting statutes do not require or allow such a rule and that fee waivers may actually advance the statutory purposes. Accordingly, in light of *Jeff D.*, we withdraw that portion of Opinion 147 which held that it is unethical per se for an attorney representing a defendant in a Title VII action, or other similar action in which statutory fees are provided, to condition an offer of settlement upon the plaintiff's waiver or reduction of attorney's fees.

In withdrawing the *per se* rule announced in Opinion 147, we do not mean to suggest that the ethical considerations we identified are never relevant in the context of negotiated fee waivers or that defense counsel are entirely free to make such offers in every case. The Supreme Court in Jeff D. recognized the authority of a district court, in the exercise of its sound discretion, to reject a class action settlement based on all of the circumstances. 475 U.S. at 742. The Court indicated that a negotiated fee waiver might be improper, for example, where the

[1] Although the attorney of record subsequently entered private practice, any fee would have inured to his former employer. *See*, 475 U.S. at 721 n.2.

defendant's offer was pursuant to a state policy or practice against the payment of fees in any case, or was, in the particular case, a vindictive effort to deter counsel from bringing civil rights actions against the defendant. 475 U.S. at 739-40. The parties in *Jeff D.* also agreed that a demand for a fee waiver would be unreasonable if the defendant has no realistic defense on the merits.

The Supreme Court in *Jeff D.* relied on a defendant's legitimate interest in fixing the entire extent of its liability as part of a settlement. In holding that an attorney representing a defendant may ethically make a lump-sum settlement offer covering both damages and attorney's fees, Opinion 147 similarly recognized "a defendant's legitimate interest in defining his liability by settlement in lieu of trial." Evidence that a defendant has insisted upon a waiver or limitation of attorney's fees where a lump-sum offer might have been made may indicate that the defendant's intent was to deter similar actions in the future.[2] For the reasons set forth in Opinion 147, it would be unethical under DR 1-102(A)(5) for the defendant's attorney to condition an offer of settlement upon a waiver of fees under this circumstance.

A second area in which an offer of settlement conditioned on a fee waiver may be unethical is where the defendant has no legitimate defense on the merits and is using the threat of further litigation to force the plaintiff to give up a legitimate claim to attorney's fees. *See*, Final Report of the Subcommittee of Lawyer Members of the Committee on Attorney's Fees appointed by the chief judges of the U.S. District Court and the U.S. Court of Appeals for the District of Columbia Circuit, reprinted at 133 D.C. Bar Report No. 1 (Aug./Sept. 1984), pp. 4, 6. While attorneys have an ethical duty to zealously pursue the interest of their clients within the bounds of the law, see Canon 7, an attorney may not knowingly advance an unwarranted claim. DR 7-102(a)(2). *See*, Rule 11, F.R. Civ. P., 28 U.S.C. 1927. This duty applies equally in the context of settlement negotiations. *See, e.g.*, Rubin, A Causerie on Lawyers' Ethics in Negotiations, 35 La. L. Rev. 577 (1975). As we noted in Opinion 147, under EC 7-14, government counsel have a special obligation to deal fairly and not take undue advantage of their position to bring about unjust settlements or results. *See, e.g., Lazor v. Pierce*, 757 F.2d 435, 43337 (1st Cir. 1985) (criticizing housing authority for insisting upon a fee waiver despite clear liability to the plaintiff.)[3]

IV

Parts I - III of this Opinion deal with the agency's suggestion that Opinion 147 should be withdrawn in light of *Evans v. Jeff D.* As we have made clear, while a *per se* rule against fee waiver requests is no longer appropriate, such a request may still be unethical if the agency had no basis for the proposal other than to deter similar future actions or to avoid payment of a fee to which the public interest group was clearly entitled.

Because the relief requested in the appeal was non-monetary, this is not a case in which a lump-sum settlement offer by the agency would have been appropriate. Nor is it certain that the petitioner would have prevailed on the merits of the appeal had the case not been settled. On the other hand, the fact that the agency apparently recognized its duty to carry out rulemaking and that petitioner was willing to accept a rulemaking schedule which was agreeable to the agency raises doubt about the agency's motivation.[4]

The agency contends that its fee proposal was reasonable because the public interest organization gained no significant relief in the litigation and was therefore not a prevailing party entitled to recover fees. The organization contends, however, that the settlement provided substantial relief which was not gratuitous. Resolution of the issue depends upon disputed facts which the Committee is not equipped to decide. Accordingly, we leave it to the parties to resolve their dispute in light of the guidance provided in this Opinion.

Dissenting Opinion of Two Members to Opinion No. 207

We dissent from the Committee's conclusion and its questioning of the agency's motives. We would have ended the opinion as follows:

IV.

Parts I-III of this Opinion deal with the agency's suggestion that Opinion 147 should be withdrawn in light of *Evans v. Jeff D.* As we have made clear, while a *per se* rule against fee waiver requests is no longer appropriate, such a request may still be unethical if the agency had no basis for the proposal other than to deter similar future actions or to avoid payment of a fee to which the public interest group was clearly entitled.

Because the relief requested in the appeal was non-monetary, this is not a case in which a lump-sum settlement offer by the agency would have been appropriate. Nor is it certain that the petitioner would have prevailed on the merits of the appeal had the case not been settled. Settlement was reached at an early stage of the appeal and the public interest group seeks a relatively small amount of fees. The agency apparently recognized its duty to carry out further rulemaking and petitioner was willing to accept a rulemaking schedule which was agreeable to the agency. If the case is settled on the merits of the appeal without the petitioner giving up its fees claim, the parties would incur the expense of further litigation over that relatively small amount of fees.

The agency contends that since the rulemaking schedule in the settlement embodied approximately an already existing internal schedule devised by the agency, its fee waiver proposal was reasonable because the public interest organization gained no significant relief in the litigation and was therefore not a prevailing party entitled to recover fees. The organization contends, however, that it is the prevailing party because the settlement provided substantial relief which was not gratuitous. It challenges the agency's assertion that an internal schedule existed and challenges the agency's motives in insisting on waiver of such a small fee.

[2] *Cf., Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093, 1112-13 n.3 (D.C. Cir. 1985) (Wald, J. concurring) ("A defendant's demand for a fee waiver may be particularly suspect when the defendant offers financial relief on the merits, since the defendant cannot then claim that it is blameless and therefore will not pay out any money.")

[3] There may be other circumstances in which it would be unethical for an attorney to make an offer of settlement conditioned upon a waiver of the plaintiff's claim for attorney's fees. The Committee believes, however, that these questions should be dealt with on a case-by-case basis. *Cf.* Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Op. No. 1987-4 (withdrawing prior opinions in light of *Evans v. Jeff D.*).

[4] The early stage of the appeal and the relatively small amount of fees sought by the public interest group may also raise doubts about the reasons for the agency's fee waiver demand.

Whether conditioning settlement on avoidance of fee litigation violated any disciplinary rule turns on whether any lawyer was knowingly advancing a harassing, vindictive or unwarranted claim or whether the agency was engaging in conduct detrimental to the administration of justice by pursuing a policy against payment of fees in any case. *See* DR 7-102(A)(1) and DR 1-102(A)(5). Resolution of the ethical issue thus depends on disputed facts which the Committee is not equipped to decide. Accordingly, we leave it to the parties to reevaluate their positions in light of the guidance provided in this opinion.

Inquiry 89-6-25
Dated: November 21, 1989

Opinion No. 208

Calculation of Attorneys Fees in Structured Settlements

• When a lawyer who has been retained under a contingency fee agreement that does not specify how the fee will be determined or paid in the event of a structured settlement, settles the case through the payment of a structured settlement to his or her client, the lawyer's fee may be based on the value of the total settlement paid to the client over time, and the fee may be paid to the lawyer as a percentage of each periodic payment received by the client.

Applicable Code Provisions

• **DR 2-106(A)**A lawyer shall not enter into an agreement for, charge or collect, an illegal or clearly excessive fee.

• **DR 5-103 (A)(2)**A lawyer may contract with a client for a reasonable contingent fee in a civil case.

Inquiry

The Office of Bar Counsel has requested an opinion based on the following hypothetical situation: A client in a personal injury claim has entered into a retainer agreement with a lawyer which provides that the lawyer will "take a one-third contingency fee of the gross amount received upon settlement or recovery at trial. The retainer agreement does not contemplate the method in which attorney's fees are calculated and from what monies it is to be disbursed in the event of a structured settlement."[1] A law suit is brought by the lawyer on behalf of this client and a "structured settlement" is reached before trial. Under the terms of the structured settlement agreement, the client would receive a lump sum payment "up front." The defendant would then provide the remainder of the settlement through the purchase of an annuity contract that would pay out installments to the plaintiff during the plaintiff's life, "with the first five years guaranteed." On these facts, Bar Counsel asks the following questions:

1. How should the Lawyer determine the value of the settlement for calculation of his or her contingent fee?
2. May the lawyer take the entire amount of his or her fee from the initial lump sum payment, or must the lawyer take his or her fee from the lump sum and each individual monthly payment?

Discussion

Before we reach the questions presented by Bar Counsel, we must address a threshold question: Does this hypothetical contingency fee agreement comply with the Proposed Rules of Professional Conduct, in light of the fact that it "does not contemplate the method in which attorney's fees are to be calculated and from what monies it is disbursed in the event of a structural settlement?"

This specific issue is not addressed in the current Disciplinary Rules ("DR")[2] or Ethical Considerations ("EC").[3] There is no present *requirement* that a contingent fee arrangement be in writing, or that it explain the method by which the fee is to be computed. Some guidance on this issue is, however, provided in EC 2-19, which states that: "It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent." In our Opinion No. 4 (1975) we interpreted EC 2-19 as providing that "the attorney bears the responsibility for seeing that there is no likelihood of misunderstanding as to fee arrangements." *See also*, Opinion No. 29 (1977). Nonetheless, it would appear that the agreement as described by Bar Counsel would not violate the Code of Professional Responsibility now in effect in the District of Columbia.

This would not be the case under the District of Columbia's Proposed Rules of Professional Conduct, published on September 1, 1988. Proposed Rule 1.5(c) provides in relevant part that:

> "...*A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined*, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated...." (Emphasis added.)

Comment [5] to the Rule provides in relevant part:

> "Paragraph (c) requires that the contingent fee arrangement be in writing. *This writing must explain the method by which the fee is to be computed*...."(Emphasis added.)

The retainer agreement described in the facts set forth by the Bar Counsel does not comply with this Proposed Rule because it does not specify the method by

[1] "Structured settlements differ from lump sum settlements in several important ways. Unlike lump sum settlements, only a *portion* of the settlement corpus is paid at the time the settlement is achieved ("up front money"). Most of the proceeds are paid in weekly, monthly, or annual installments to the claimant. The deferred payments might increase over time by an agreed percentage, and may include lump sums at 5, 10 , 15 year settlement anniversay dates, or longer. Frequently, the deferred installment payments are guaranteed for a number of years, despite the longevity of the claimant. There {sic} are all matters subject to negotiation, and depend upon the circumstances of each case." Calif. State Bar Formal Opinion No. 1987-94.

[2] The existing Disciplinary Rules define when a lawyer shall not enter into a contingent fee arrangement, and when he may. DR 2-106(C), provides that: "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case," and DR 5-103(A)(2) provides that: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may contract with a client for a reasonable contingent fee in a civil case."

[3] Ethical Consideration 2-20 to Canon 2 of the Code of Professional Responsibility notes that contingent fee arangements in civil cases have long been accepted in the United States in proceedings to enforce claims, and discusses the historical bases for such acceptance. It also discusses the factors a lawyer should consider before entering into contingency fee arangements, and notes that such arrangements "in domestic relations cases are rarely justified," and "public policy properly condemns contingent fee arrangements in criminal cases." Ethical Consideration 5-7 to Canon 5 provides that a lawyer may enter into a reasonable contingent fee arrangement even though it gives the lawyer a financial interest in the outcome of litigation, but should do so only in those instances where the arrangement will be beneficial to the client.

which the contingency fee is to be calculated. If such an agreement were entered into after Proposed Rule 1.5(c) was adopted, it would violate that Rule.

The Ethics Committee of the Mississippi State Bar noted in an Opinion on how a standard contingent fee contract should be interpreted when a structured settlement is reached: "The determination as to how a contract should be applied when there is a result that was not provided for in the contract is a legal, not an ethical subject. However, the Code of Professional Responsibility does contain ethical guidance which should be helpful in preventing problems in this regard." Miss. State Bar Opinion No. 92 (March 23, 1984).[4]

How Should the Lawyer Determine the Value of the Settlement for Calculation of His or Her Contingent Fee?

In determining the value of the settlement for purposes of calculating his contingency fee, the lawyer must be guided by DR 2-106(A): "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Factors to be considered in determining whether a fee is clearly excessive are set forth in DR 2-106(B). These include "(1) The time and labour required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly," and "(8) Whether the fee is fixed or contingent."

This does not mean, however, that the value of the settlement for calculating the lawyer's fee must be based on the amount of the initial lump sum payment plus the purchase price of the annuity -- the cost of the settlement to the defendant -- rather than the amount of money to be paid out to the plaintiff over time. First, the defendant may not always want to disclose the cost of the settlement to the plaintiff. Second, the initial lump sum and annuity purchase price represents the current value of the annuity at the time of settlement, and the current value would be an appropriate basis from which to calculate the lawyer's one-third fee only if the lawyer was to receive his full fee from the initial (current) payment to the plaintiff.[5] This conclusion is consistent with the view expressed by the Ethics Committee of the Mississippi State Bar in response to the question whether the percentage in the standard fee contract should be applied to the total amount to be received by the plaintiff in a structured settlement, or to a discounted present value of the total to be received by plaintiff, or to the total cost of the settlement to the defendant:

> "Keeping in mind the teachings of EC 2-17, we suggest that *when the lawyer's fee is to be paid in a lump sum as part of a structured settlement*, in the absence of unusual circumstances the fee should be based upon the present value or upon the cost to the defendant, whichever is agreed upon between the lawyer and client." (Emphasis added.)

Miss. State Bar Opinion No. 92. *See also*, Nassau County Bar Assn. Comm. on Prof. Ethics Opinion No. 84-6 (Nov. 22, 1983).

In the absence of an explicit agreement between the lawyer and his client as to how the fees are to be calculated and from what monies they are to be paid, however, the lawyer and client may disagree on the valuation of the settlement for calculation of the fee, and the Disciplinary Rules do not require the adoption of one method of valuation over another. Thus,

> "if a contingent fee contract does not explain the method of calculating the lawyer's fee under a structured settlement, it is suggested that the lawyer discuss the matter with his client and agree upon the method of calculating a contingent fee in the event of such a settlement as soon as the question of periodic payments becomes involved in settlement negotiations, or as soon as it occurs to the lawyer or client that a structured settlement might be proposed."

Miss. State Bar Op. No. 92. As we stated in our Opinion No. 29, where lack of clarity in the fee agreement does give rise to a disagreement:

> "It follows of course [from EC 2-19] that in the event there is a misunderstanding which results from a lack of clarity in the fee arrangements, the responsibility for its consequences should be borne by the attorney and not by the client."

Therefore, if the plaintiff and his or her lawyer cannot agree, the lawyer should not be able to recover the full fee from the initial payment to the client. Conversely, if the lawyer is to recover her or his fee from each payment the client receives, there is no reason to attempt to determine the current cost of the settlement to the defendant.

A contingent fee is ordinarily a percentage of the amount received by the plaintiff, without reference to the cost incurred by the defendant in providing this amount to the plaintiff. When the plaintiff receives a settlement in one lump sum payment, the lawyer's fee, usually one-third of the settlement amount, is subtracted from that payment. This same principle should apply if the settlement is structured to be paid to the plaintiff over time; the lawyer's fee would be one-third of each periodic payment, subtracted from each payment.

This would not be an excessive fee, in violation of DR 2-106(A), because the

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[4] At least two State Bars have addressed the question whether there is an inherent conflict of interest between the plaintiffs' lawyer and the plaintiff in reaching a structured settlement. The Standing Committee on Professional Responsibility and Conduct of the State Bar of California has ruled that it is not a conflict of interest for a member to recommend acceptance of a structured settlement to a client, but that the manner in which the settlement is valued must be considered to avoid payment of an exorbitant of unconscionable fee. State Bar of California Formal Opinion No. 1987-94. The Ethics Committee of the Disciplinary Board of the Supreme Court of Tennessee has visited this issue in a number of opinons. After first stating that "[t]he conflict of interest that arises from the fee interest potential of structural settlements is so inherently conclusive to divided loyalties as to amount to a conflict of interests with the client," Tenn. Formal Ethics Opinion 80-F-1 (Sept. 5, 1980), the Committee subsequently issued a clarificaiton stating that the opinion was not intended to condemn structured settlements. Tenn. Formal Ethics Opinion No. 80-8-1 Supp. (April 16, 1981). In subsequent opinions the Committee set forth the cirumstances under which an attorney representing a plaintiff in a structured settlement could receive the entire fee from the funds immediately available to the client, and the conditions under which the lawyer could "structure the receipt of the fee," Tenn. Formal Ethics Opinion 84-F-77 (Oct. 17, 1984). *See also*, Tenn. Formal Ethics Opinion 80-F-6 (May 12, 1981) and 96-F-96(a) Sept. 26, 1986.

[5] *E.g., Donaghy v. Napoleon*, 543 F.Supp. 112, 113 (D.N.J. 1982) ("In determining the amount of the recovery on which the fee is to based, the court must calculate the fair market value or the present cost of the settlement fund."); *In re Estate of Muccini*, 118 Misc. 2d 38, 460 N.Y.S. 2d 680 (1983) (attorney's fee to be calculated on basis of cost to defendant of securing annuity rather than on speculative basis of discounted present value of payments with addition of projected tax saving to client); *Tobias v. Autore*, 182 N.J. Super. 328, 330, 440 A. 2d 1171 (Law Div. 1982) ("in a 'structured settlement' the total actural cost is the proper basis upon which to calculate attorneys' contingent fees"). *See also, Meredino v. FMC Corp.*, 181 N.J. Super 503, 438 A2d 365 (Law Div. 1981). For a fuller discussion of these and other cases regarding how attorney fees should be determined under contingent fee arrangements in structured settlement cases, see Annot., *Propriety and Effect of "Structured Settlements" Whereby Damages Are Paid In Installments Over a Period of Time, and Attorney Fee arangements In Relation Thereto*, 31 ALR 4th 95 (1982).

lawyer receives the same percentage of the total settlement as if it had been paid in one lump sum. The client is not disadvantaged because the lawyer receives each portion of his or her fee only when (and if) the client receives each periodic payment required under the structured settlement agreement. Thus, in the hypothetical case presented by Bar Counsel, the lawyer may receive as his or her fee one-third of the initial payment to the plaintiff and one-third of each subsequent payment to the plaintiff. This rule would apply in the absence of a written agreement between the lawyer and client on how the lawyer's fee will be determined and when it will be paid in the event of a structured settlement.[6]

May the Lawyer Take the Entire Amount of His Fee from the Initial Lump Sum Payment, or Must the Lawyer Take His or Her Fee from the Lump Sum and Each Monthly Payment?

Our answer to the second question presented by Bar Counsel is subsumed in our answer to the first question above. On the facts presented, the lawyer must take his or her contingent fee percentage from the initial lump sum payment and from each monthly payment. *See, Cardenas v. Ramsey County*, 322 NW2d 191, 31 ALR4th 89 (Minn. 1982) (in the absence of an explicit agreement providing that an attorney shall receive his entire compensation for his services in procuring a structured settlement from the front money paid thereunder, a contingent fee contract which provides that attorney fees will be one-third of the total amount recovered will be construed to provide that the lawyer will receive one-third of each payment received by the client under the settlement as and when the client receives it).

Inquiry No. 89-5-21
Adopted: November 21, 1989

[6] We do not hold that the mere existence of a written contingent fee agreement which applies to a structured settlement is *per se* ethical. A fee agreement between a lawyer and client may itself contain provisions which conflict with DR 2-106(A). We decide only that where a lawyer has been retained on a contingent fee agreement with the client that is applicable to a structured settlement the amount of the lawyer's fee should be determined, and the fee paid, as set forth in this Opinion.

Opinion No. 209

Multiple Representation; Duty to Maintain Files for Benefit of All Clients.

• A lawyer who represented more that one client in a closed matter may not give all files relating to the matter to one of the clients, but must preserve the files for the benefit of all clients so long as destruction of the files would be detrimental to the interests of any of the clients. If a lawyer is required to maintain files for the benefit of multiple clients, he may charge for making copies of the files for any individual client who requests such copies.

Applicable Code Provisions

• **DR 2-110(A)(2)** Upon withdrawal from employment, a lawyer shall deliver to the client all papers and property to which the client is entitled.

• **DR 9-103(b)(4)** A lawyer must return to the client all funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Inquiry

A law firm jointly represented one minor child, two surviving adults, and six decedents as plaintiffs in an action for personal injuries. The matter was settled short of trial. The record in the case consists of approximately 10,000 pages of pleadings, depositions and exhibits. The personal representative for three of the decedents has asked the firm to provide him a copy of the firm's complete file in the case. The firm has offered to permit the requestor to review the files at the firm and to make a reasonable number of copies at firm expense. The requestor has rejected this offer, but has not offered to pay the cost of duplicating the entire file, which is estimated to exceed $2,000. The firm asks: As an alternative to duplication, may the firm simply give the original file to the requesting party? If not, who must pay for the cost of duplicating the file?

Discussion

We have issued a number of opinions concerning the duty of counsel to provide records to a former client, or an attorney for a former client.[1] Opinion 206, issued in October 1989, summarizes the duty of counsel with respect to these issues.

With respect to pleadings, depositions and exhibits (what may loosely be called the "work product" of a case),[2] the lawyer must decide (1) whether he is under any legal or contractual duty to maintain the files and (2) if not, whether the destruction of the files would be prejudicial to a former client. If there is a legal or contractual duty to keep the files, or their destruction might prejudice a former client, then the files must be retained. In the absence of an obligation to retain the files, we recommend that the lawyer attempt to contact his former client, in writing, to advise the client that files are about to be discarded, and give the client an opportunity to request an alternative disposition.

Where, as here, a firm has multiple clients with respect to a single matter, the obligations stated in Opinion 206 apply to each client. *See e.g.*, D.C. Opinion 143, construing DR 7-101. While the request is not clear, giving the original files relating to all of the former clients to the representative of only three of those clients would apparently be tantamount to discarding the files with respect to the remaining former clients. Such discard can be made only under the conditions set out in Opinion 206, otherwise the firm must retain the records for the benefit of all of its clients.

If the firm concludes that it is precluded from giving the files to the requesting party because others of its former clients could be prejudiced by such a disposition, and if the requestor persists in demanding copies of 10,000 pages, then we find no ethical prohibition against charging the requesting party the

[1] *See, e.g.*, Opinions 14, 168, and 206. These opinions, insofar as they are applicable here, rest on DR 2-110(A)(2), DR 9-103(B)(4), and EC 2-32. Substantially identical obligations are set out in the Rules of Professional Conduct of The District of Columbia Bar, adopted by Order of the D.C. Court of appeals on March 1, 1990, in Rules 1.15(b), 1.16(d), and Comment 10 to Rule 1.16. It is, therefore, the opinion of the Ethics Committee that the guidance given in this Opinion and Opinions 14, 168, and 206 will continue to be correct after the effective date of the New Rules, January 1, 1991.

[2] As we explained in Opinion 168, the obligation to give files to a former client extends beyond the concept of work product as used in the law of evidence to include any item that would be useful to the former client in his present affairs.

actual costs of making copies of the file.[3] We note, however, that the easiest course for all concerned would seem to be for the firm and the requesting party jointly to request the consent of all former clients to the transfer of the files to the requesting party under whatever safeguards may be appropriate to protect the interests of all the clients.

Inquiry No. 87-8-43
Adopted March 20, 1990

Opinion No. 210

Representation Of Criminal Defendants By Attorney Seeking Position As Assistant U.S. Attorney

• A lawyer who is primarily engaged in criminal defense work may continue to represent criminal defense clients while seeking a position with the United States Attorney's office provided that each of his/her criminal defense clients gives consent to the representation after full disclosure of the possible disadvantages that may result if the lawyer must withdraw to start employment with the United States Attorney. Disclosure must be made and consent obtained when the lawyer takes the first active step in seeking such employment. With disclosure and consent, a lawyer may accept new criminal defense clients after deciding to apply to the United States Attorney's office, before commencement of employment

Applicable Code Provisions

• **DR 7-101** (Representing a Client Zealously).

• **DR 5-101** (Refusing Employment when the Interests of the Lawyer May Impair His Independent Professional Judgment).

Applicable Rules Provision

• **Rule 1.7** (Conflict of Interest: General Rule)

Inquiry

An attorney practicing in the District of Columbia primarily represents criminal defendants under the Criminal Justice Act in the Superior Court of the District of Columbia. The attorney determines to seek a position with the United States Attorney's Office for the District of Columbia and submits a resume for review. It will be several weeks before the United States Attorney's offices decides whether or not to grant the applicant an interview. Thereafter, if she is offered a position as an Assistant in the U.S. Attorney's Office, actual employment may not commence for a number of months, perhaps as long as a year, pending an FBI investigation and because of federal hiring freezes.

The attorney asks whether she must disclose to her clients her decision to seek employment with the prosecutor's office, and whether she is required to withdraw from representation of criminal defendants prosecuted by the United States Attorney's office:

1) As soon as she determines to seek a position with the United States Attorney's office;
2) When she submits a resume;
3) When she is granted an interview;
4) When she is offered a position;
5) When an employment date is set.

The attorney also inquires whether she must disclose the potential conflict to the trial court even if after disclosure to the client, the client agrees to let the attorney continue as counsel. Finally, the attorney inquires whether she may continue to represent criminal defendants who are prosecuted by the District of Columbia Corporation Counsel's Office, after employment is offered but before it commences with the United States Attorney's office; and if so whether she must disclose her pending employment to her clients in such cases.

Discussion

This inquiry raises the issue whether a lawyer who is actively seeking a position as a prosecutor in the office of the United States Attorney for the District of Columbia is thereby disqualified during the pendency of her job application, and before she has a firm employment date, from continuing to represent clients involved in criminal investigations or proceedings being conducted by that office and by the District of Columbia Corporation Counsel's office. The questions to be resolved are first, whether the lawyer's interest in pursuing this ambition will or reasonably may be expected to affect the exercise of her professional judgment in behalf of her clients; if so, whether and under what circumstances the lawyer may continue to represent existing clients in criminal cases being prosecuted by the United States Attorney's office after deciding to seek a position with that office; and, second, whether the lawyer after determining to seek a position with the United States Attorney's office, may continue to seek and accept new employment to represent clients being prosecuted by that office or by the District of Columbia Corporation Counsel's office.

In defining the obligation of the bar to represent clients zealously within the bounds of law, DR 7-101 (A) provides that "A lawyer shall not intentionally: (1) fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules,...." This grave responsibility, which is also set forth in Rule 1.3 of the Rules of Professional Conduct and Related Comments (adopted March 1, 1990 by the D.C. Court of Appeals and effective January 1, 1991), is of special importance in criminal proceedings where the client's liberty is in jeopardy.

To insure the lawyer's independence and freedom to act at all times in the best interests of his or her client, DR 5-101 enjoins the lawyer to refuse employment when some personal interest may impair the lawyer's independent professional judgment. Thus, DR 5-101(A) provides: "Except with the consent of this client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests." *Cf.* Rule 1.7(B)(4) of the Rules of Professional Conduct effective January 1, 1991.

This rule governs the lawyer's initial decision whether or not to undertake the representation of a client in a new matter when some existing interest of the lawyer might reasonably be expected to affect the zealousness with which the lawyer acts in behalf of the client. The rule has also been interpreted to impose a continuing ethical obligation on a lawyer not to place his or her personal interests above the client's interests. Opinion Nos. 144, 169.

Rule 1.7 of the new Rules effective January 1, 1991, contains prescriptions similar to those of DR 5-101.

[3] In Opinion 168, we held that a lawyer who wishes to retain a portion of a former client's file for the benefit of the lawyer or his firm must bear the cost of making copies. Where, as here, the firm holds the records for the benefit of others, not for itself, this rule has no aplication.

DR 5-101(A), read literally, addresses the question of whether and when a lawyer may accept new employment that might be in conflict with the lawyer's own business or personal interests; or which might adversely affect the lawyer's ability to exercise independent professional judgment in behalf of an existing client, or otherwise involve the lawyer in representing conflicting interests. In considering the present inquiry the Committee interprets this rule as applying as well to the question of whether and when a lawyer may affirmatively seek new employment which, if accepted, would create the same sort of conflicts.

1. Lawyer's Duty to Existing Clients When He or She Applies for a Position in the Prosecutor's Office

The overriding consideration in addressing the questions raised by this inquiry, is not the personal interest or ambition of the lawyer, but the lawyer's responsibility to represent his or her client zealously within the bounds of law, especially those who may be charged with a crime. Clearly, the lawyer cannot allow personal interests to interfere with that duty. The lawyer may perceive the particular prosecutor handling a case or matter she has been retained to defend as having some influence over her employment prospects. She may also believe that her advocacy skills as demonstrated in that case or matter will provide a principal basis upon which she will be evaluated. If so, she likely will seek to make a favorable impression. It is difficult to know whether or not these subjective feelings will compromise her zealous representation of her client. They may or they may not. In some circumstances the lawyer may work even harder in her client's behalf in order to demonstrate her competence and ability.

Thus, the lawyer may redouble the effort and time she previously gave to the client's cause, working more vigorously to master the applicable law and facts of the case. Obscure tactics and defenses may receive greater attention than otherwise, and the lawyer, in an effort to perform well, may conduct a more thorough discovery to better anticipate the prosecution's attack. At trial, the attorney may put forth her defense and counter the prosecution more energetically than otherwise. All of this activity, though driven by the lawyer's personal interest in performing well and enhancing her employment prospects, would benefit the client also. The interests of the lawyer and the client in this situation, therefore, could very well be consistent.

On the other hand, when representing clients in criminal proceedings, the lawyer is often required to make judgments as to courses of action and to assert rights that heavily burden the prosecution and create difficult obstacles to conviction of the lawyers's clients. The prosecutor may view some of defense counsel's tactics as unwarranted, technical, unreasonable or even personally offensive.

Moreover, criminal investigations and trials are the most adversarial of all litigation. It is to be expected that the prosecutor will vigorously contest, in his effort to obtain a conviction, virtually all of defense counsel's requests for discovery, pre-trial motions, and trial tactics. In the context of such hotly contested and adversarial proceedings, relationships between opposing counsel may become strained. Nevertheless, defense counsel is obligated to take whatever lawful and ethical measures are required to vindicate a client's cause without regard to opposition, obstruction, or personal interests, such as a desire not to offend or irritate members of the prosecutor's office from which she is seeking or may have recently received favorable job consideration. Where concern for jeopardizing her employment opportunities interferes with a lawyer's representation of her client, an impermissible conflict of interest exists.

The difficulty, therefore, is that, while the lawyer may react in this situation in a manner entirely consistent with her client's best interests, she could also perceive her own interests to be in conflict with those of her client. Moreover, the lawyer may not be able to foresee whether or when this conflict will arise during the course of her representation.

The Committee finds that DR 5-101 applies here, as will Rule 1.7 when it becomes effective on January 1, 1991. These rules provide that, where, as here, the lawyer's judgment on behalf of her client reasonably may be affected by her own personal interests, she may not proceed without obtaining the client's consent after full disclosure. (DR 5-101(A)).

The Committee has previously recognized "that the obvious ability to provide adequate representation, which pursuant to DR 7-101 must be zealous, is an independent requirement which must be met even though consent is provided." Opinion 163, referring to Opinion 49. A criminal defendant, moreover, may feel compelled to give consent rather than incur the delay and inconvenience which would otherwise result.

While it is ultimately the lawyer's own subjective perception of the relationship between her interests and the client's which determines the existence of a conflict,[1] the evaluation of the potential for conflict necessarily must rest with the client. Thus, even if the lawyer determines that her own interests in obtaining a position in the prosecutor's office will not impair the zealousness of her representation of her client's interests, this possibility must be fully disclosed to the client. The client must also be made aware of the possibility of added expense, delay, inconvenience and other disadvantages to the client that may occur, if the lawyer must subsequently withdraw from the case, perhaps at a most inconvenient time, to commence employment with the United States Attorney's office. Only if the client consents after full and complete disclosure of all of these possibilities may the lawyer continue to represent the client. See Comment [12] to Rule 1.7 effective January 1, 1991.

The Committee believes that this duty to disclose and seek consent arises when the attorney has determined to pursue employment with the United States Attorney's Office for the District of Columbia. Thus, disclosure should be made not later than when the lawyer takes the first active step in seeking such employment. This may be when the lawyer calls to discuss or inquire about procedures for making application; and the duty certainly arises when the lawyer submits a resume.

Further, the lawyer must apprise her client of any significant change in her employment prospects with the prosecutor's office, particularly any

[1] If in the lawyer's own mind the conflict of interests is insurmountable, and she cannot at the same time pursue her personal interest in becoming a prosecutor while continuing to represent criminal defendants, she must of course withdraw (no not submit) her application to the U.S. Attorney's office until all of her pending criminal matters have been completed.

developments tending to indicate that the lawyer might need to withdraw from the representation. This duty derives from the lawyer's obligation to mitigate the burden which withdrawal imposes on the client.[2]

2. During Pendency of Application For a Position In Prosecutor's Office, Lawyer May Accept New Criminal Defense Clients With Their Consent After Full Disclosure

The resolution of the question whether or not the inquirer may seek and accept new criminal defense clients after she has determined to apply for a position with the United States Attorney's office, while her application is pending and before employment is scheduled to commence, is governed by DR 5-101(A). This rule permits a lawyer, with the consent of the client, to accept new employment even though the exercise of the lawyer's independent judgment might be affected by some business or personal interest.

In these circumstances, assuming full disclosure, the client is in a position to evaluate the possibility that the vigor of the lawyer's representation may be tempered by a desire not to take any action that could lessen the chances of her becoming a member of the prosecutor's staff. A decision can be reached freely without concern about possible significant disadvantages if consent is refused. Other counsel not so infected with adverse personal interests are presumably available, and there is no apparent reason why the client would suffer any significant delay, expense or inconvenience by refusing consent.

Accordingly, the Committee concludes that under DR 5-101(A), the lawyer may accept new criminal matters with the consent of the clients after full disclosure.

There remains the question whether a lawyer may continue to seek and accept new employment to represent clients being prosecuted by the District of Columbia Corporation Counsel's office during the pendency of her application with the United States Attorney's office. This question does not present a situation in which there is or may be a conflict between the lawyer's interests and her client's interests. Unlike the scenario which the above analysis contemplates, the lawyer cannot reasonably be concerned about jeopardizing her employment prospects in an unrelated agency by her actions in zealously defending a criminal client prosecuted by a different agency. Therefore, neither DR 5-101 nor DR 5-105 applies. Although a client in a criminal matter may prefer that his lawyer be completely "defense oriented" and not even consider becoming a prosecutor while defending him, this preference does not mean that a potential or actual conflict of interest exists, absent the circumstances described above. Consequently, the Committee finds that the lawyer is not obligated to disclose to any of her clients who are being prosecuted by the District of Columbia Corporation Counsel's office that she is seeking employment with the United States Attorney's office.

Concurring Opinion of Four Members

We agree with the Committee's conclusion but wish to emphasize the narrow reach of the Opinion.

The Inquiry presents a situation in which the lawyer has an extensive ongoing criminal practice and the employment process in the U.S. Attorney's Office takes many months to complete. Since the lawyer cannot be expected to cease her practice entirely, it is not feasible for her to time her decision to seek employment with the U.S. Attorney's Office until the possible conflict with existing clients is eliminated. In other circumstances, however, it may be feasible for a lawyer to avoid any conflict by delaying the decision, in which case, we believe the lawyer may have an ethical duty to withhold the application until the conflict is removed. *See*, EC 5-2 ("After accepting employment, a lawyer carefully should refrain from assuming a position that would tend to make his judgment less protective of the interests of his client.")

Inquiry No. 88-2-5
Adopted April 17, 1990

Opinion No. 211

Fee Agreements; Mandatory Arbitration Clauses.

- A lawyer may not insist that a client enter into a fee agreement containing a clause mandating arbitration of fee and malpractice disputes unless the client is represented by other counsel.

Applicable Code Provisions

- **DR 2-106 (A)** A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
- **EC 2-19** Desirability of written fee agreements.
- **EC 2-23** A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject.
- **DR 6-102(A)** A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

Applicable Rules Provisions

- **1.5(b)** Requirement of written fee disclosures.
- **1.8(a)** In transactions with clients, a lawyer shall make full written disclosure of relevant information and shall give the c1lient a reasonable opportunity to seek independent legal advice.
- **1.8 (g)** A lawyer shall not attempt to limit his liability to his client for his personal malpractice.

Inquiry

A law firm proposes to use a form retainer agreement which describes the legal representation to be provided and states that the law firm will use "its best efforts on behalf of the client's interest." The agreement requires the firm and its client to resort to arbitration for "[a]ll claims, disputes and other matters in question arising out of, or relating to, payment under this Contract for Legal Services, or the breach thereof ...." By its terms, the agreement requires arbitration of claims by the firm against its clients for unpaid fees and claims by the client against the firm for malpractice.

Fee disputes are to be arbitrated before the Fee Arbitration Board of the District of Columbia Bar, or if that is not available, before an arbitration panel mutually chosen by the parties. All other disputes are to be arbitrated in the District of Columbia under the rules of the American Arbitration Association. The agreement states that the client consents to the jurisdiction of the Superior Court of the District of Columbia for "all purposes in connection with arbitration" and

[2] While there may be situations where it would be appropriate to do so, this opinion does not address the question of whether a lawyer should inform the judge handling a client's case that he or she has applied for a position in the prosecutor's office.

agrees "to pay reasonable attorney's fees in the amount of fifteen percent (15%) of the balance owed to the law firm..., plus all costs of said suit." Finally, the contract erects a two-year statute of limitations within which arbitration must be started.

The law firm asks whether the mandatory arbitration provisions are proper under the District of Columbia Code of Professional Responsibility.

Discussion

In our Opinion 103, we decided that written retainer agreements are highly desirable, and to that end we approved the use of a form agreement for legal services.[1] However, we warned that form agreements "may not be adequate to set forth fully and fairly the terms of representation for all legal matters or for all attorney-client relationships," and that great care must be taken to insure that form agreements comport with all relevant ethics requirements.

In our Opinion 190, we held that a lawyer was not prohibited from incorporating in a fee agreement a clause which mandated arbitration of all disputes between lawyer and client under the procedures of the American Arbitration Association or the District of Columbia Bar Fee Arbitration Board.[2] However, we cautioned that a mandatory arbitration provision was not proper unless the lawyer made full disclosure to his client concerning any rights the client might waive by agreeing to arbitration and that the lawyer must not create arbitration procedures that violate DR 6-102(A).

Opinion 190 was issued prior to the promulgation of Rule 1.8 of the District of Columbia Rules of Professional Conduct, which is similar to rules in other jurisdictions that have been construed to bar mandatory arbitration provisions in retainer agreements unless the lawyer at least advises his client to seek independent legal counsel before entering into such an agreement. In addition, we note that Rule 1.5(b) of the new Rules of Professional Conduct will soon require lawyers to provide many clients with written statements concerning fee practices. Accordingly, we believe it appropriate to visit again the issues raised by mandatory arbitration clauses in written retainer agreements

The State Bar of Michigan, in Opinion RI-2, which applies Rule 1.8(h)(1) of the Michigan Rules by analogy,[3] has disapproved mandatory arbitration provisions in fee agreements unless the client has actually received independent counsel on the advisability of entering into the agreement. Opinion RI-2 notes that the lawyer and the client may have conflicting interests with respect to whether arbitration is appropriate and that, at the least, the client may not have the knowledge needed to make an informed decision about arbitration. The Philadelphia Bar Association's Opinion 88-2, relying on Rule 1.8(a)[4] of the Pennsylvania Rules of Professional Conduct, requires that a lawyer advise his client "in writing, in simple direct language, that by agreeing to arbitration the client is waiving the right to trial by jury...," and to seek independent legal counsel before executing the arbitration agreement.

Our Opinion 190 similarly cautioned that lawyers must "make a full disclosure to the client of all the ramifications of an agreement to arbitrate," and we suggested that any agreement limiting the availability of punitive damages would be unethical under DR 6-102(A). However, over a dissent, this Committee rejected the need for independent counsel as required by Michigan and Philadelphia.

Our Court of Appeals has now promulgated Rule 1.8(a),[5] which states:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) The client consents in writing thereto.

While a mandatory arbitration provision does not precisely fit the language of the Rule 1.8(a), comment one to the Rule suggests that the Rule should be broadly construed to cover transactions in which the lawyer may have a conflicting interest with his client and has any advantage in dealing with the client.

> As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Paragraph (a) does not, however, apply to standard commercial transactions[.] ... In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. (Emphasis added).

Our previous opinions concerning the lawyer-client fee relationship have similarly stressed the need for complete fair dealing by the lawyer with his client in the fee agreement. When a lawyer seeks to impose an atypical requirement in a fee agreement, for example, the lawyer must explicitly bring that provision to the attention of the client at the time the agreement is presented so that the client can intelligently consider the provision. *See, e.g.*, Opinion 11 (in-

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[1] The District of Columbia Rules of Professional Conduct also permit the use of form agreements:

> "...[A]n individual writing specific to the particular client and representation is generally not required. Unless there are unique aspects of the fee arrangement, the lawyer may utilize a standardize letter, memorandum or pamphlet explaining the lawyer's fee practices, and indicating those practices applicable to the specific representation.

Comment 2 to Rule 1.5.

[2] The value of fee arbitration is recognized in the District of Columbia Rules of Professional Conduct, which counsel attorneys to submit fee disputes to arbitration or mediation procedures established by the Bar *when those procedures are invoked by a client. See* Comment 15 to Rule 1.5.

[3] Michigan Rule 1.8(h)(1) provides:

> A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice *unless permitted by law and the client is independently represented in making the agreement.*

The equivalent District of Columbia Rule of Professional Conduct, Rule 1.8(g)(1), does not contain the italicized last clause, which was intentionally deleted by the Bar in proposing Rule 1.8(g)(1) to the Court of Appeals. Were our Rule 1.8(g)(1) applicable to arbitration provisions, which we hold it is not, then no agreement to arbitrate malpractice claims would be permissible in the District of Columbia.

[4] Pennsylvania Rule 1.8(a) is identical to the District of Columbia Rule.

[5] Rule 1.8(a) is a refocusing of the provisions of DR 5-104(A). DR 5-104(A) requires full disclosure by the lawyer to the client of possible conflicts arising from business transactions with the client and consent by the client after full disclosure.

terest on unpaid fees). Second, the lawyer owes the utmost duty of candor and fair dealing to the client with respect to fee matters. *See, e.g.*, Opinion 185 (billing for disbursements). Our Opinion 190 also stressed the "obligation to make a full disclosure to the client of all the ramifications of an agreement to arbitrate."

Our consideration of the arbitration provisions in instant agreement has lead us to the conclusion that Opinion 190 was incorrect in its belief that the complex nature of arbitration could be adequately disclosed to a lay client. The virtue of arbitration is its flexibility; arbitration procedures will typically be "atypical". The salient characteristics of an arbitration which must be disclosed are therefore very difficult to catalog.

For example, is the arbitrator to be paid and, if so, must these fees be disclosed to the client? The instant agreement provides for both D.C. Bar and American Arbitration Association ("AAA") arbitration, but does not disclose that the arbitrators must be paid. Since the fee for D.C. Bar arbitration is $25.00, perhaps it does not need to be disclosed. On the other hand, AAA fees can be substantial and surely would have to be disclosed. Similarly, what of matters of procedure? Neither the D.C. Bar nor the AAA Commercial Arbitration rules provide for discovery.[6] Must this be disclosed? If so, how are the tactical considerations to be explained to a lay client? Arbitrations are typically not open to the public, while trials are. Must the client be told of this distinction; does it raise a tactical issue? In our Opinion 190, we stated that punitive damages are not available in arbitrations, but now we are told that there is a line of cases permitting arbitrators to award any type of damage a jury could award. If that is so, must the attorney advise the prospective client on the advantages and disadvantages of jury trial versus an arbitrator's award for malpractice damages?

A second level of complexity arises with respect to the enforcement of the arbitral award. The instant agreement requires the client to consent in advance to the jurisdiction of the Superior Court of the District of Columbia. Is this fair to a client who resides in California and retains a District of Columbia attorney with a special federal expertise to handle a complex federal matter in, for example, (a) California, (b) Texas, or (c) North Carolina? Why should such a client be forced to bear the expense of travel to the District of Columbia to arbitrate even a simple fee dispute? On the other hand, can an uncounseled client realistically be expected to appreciate the issues raised by forum selection and is it practical for a lawyer in an initial meeting with the client to attempt to explain such a thing?

In summary, this Committee has come to the conclusion that it is unrealistic to expect lawyers to provide enough information about arbitration to a prospective client, particularly on a first visit, so that the client can make an informed consent to a mandatory arbitration provision. It is equally unrealistic to conclude that limited disclosure coupled with the advice to seek independent legal counsel will cure the problem. How many clients either will see or can afford to see a second lawyer as a condition of entering into an agreement with the first? Therefore, we now conclude that Opinion 190 was incorrect in supposing that adequate disclosures concerning mandatory arbitration could be made to lay clients.

Accordingly, mandatory arbitration agreements covering all disputes between lawyer and client are not permitted under either our prior Opinions or Rule 1.8(a) unless the client is in fact counselled by another attorney.[7] We see no problem, on the other hand, with proposing mandatory arbitration where a client has actual counsel from another lawyer, who has no conflict of interest, upon whom the client can rely to assess the complexities posed by arbitration.

Even when mandatory arbitration is permitted, however, it is important to observe other restrictions on lawyer-client agreements in framing the procedures to be used. Where an arbitration agreement covers claims by the client for malpractice, the restrictions contained in DR 6-102(A) and Rule 1.8(g) of the District of Columbia Rules of Professional Conduct must be observed. In the instant case, for example, DR 6-102(A) makes unethical the lawyer's attempt to reduce the limitations period for malpractice below that otherwise provided by law.[8]

Finally, we turn to that portion of the agreement which imposes on the client additional legal fees equal to 15 percent of fees owed in the event that the firm goes to arbitration and prevails. This provision must be considered under DR 2-106(A), which provides that "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Given the speed, efficiency and reduced costs or arbitration, the 15% charge may well be unrelated to any actual costs incurred by the firm and quite likely excessive. As we have stated in other opinions, "the firm must make certain that the percentage bears a reasonable relationship to the costs incurred." Opinion 155.

Nothing in this Opinion should be read to discourage firms from seeking to avail themselves of the benefit of alternative dispute resolution techniques for resolving claims made by or against a firm. In the context of an actual dispute, rather than at the outset of the lawyer-client relationship, it may well be possible to recommend arbitration and to make all required disclosures in a fashion that permits intelligent consideration even by the lay client.

Dissent Of Two Members From Opinion No. 211

In a series of recent decisions the United States Supreme Court has broadly endorsed arbitration as an alternative to traditional litigation as a means of resolving disputes in a wide range of circumstances.[9] The Court's decisions have

[6] The instant agreement made reference to AAA procedures without giving even a general description of those procedures. We doubt that even most lawyers know what those procedures are.

[7] We note that we do not have before us the case of an agreement limited to resolving fee disputes by arbitration before the D.C. Bar Fee Arbitration Board. The Board Rules have been designed to be inexpensive, quick, and fair to clients, and are publically available. These are important characteristics that could lead to a different outcome.

[8] The limitations period for malpractice in the District of Columbia is three years, D.C. Code §12-301(8), *see, e.g., Duggan v. Keto*, 554 A.2d 1126 (D.C. App. 1989), whereas the proposed form agreement erects a two-year limitations period.

[9] *E.g., Rodriquez de Quijas v. Shearson/Am. Exp., Inc.*, 109 S. Ct. 1917, 1920 (1989); *Shearson/Am. Exp., Inc., v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). *See also United Paper Workers v. Misco, Inc.*, 108 S. Ct. 364 (1987); *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643 (1986); *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983).

applied not only to labor arbitration but to the broad range of commercial arbitrations subject to the United States Arbitration Act., 9 U.S.C.§§ *et seq*. The District of Columbia Court of Appeals has given similarly broad reading to the District of Columbia's enactment of the Uniform Arbitration Act.[10]

The majority, however, treats disputes between lawyers and their "lay clients" as inherently different from all other disputes, without ever explaining why and without any solid foundation in the applicable provisions of the Code or Rules. In other contexts arbitration agreements have been held enforceable without regard to whether each party fully understood its impact or the potential differences between arbitration and litigation. The AAA has a useful brochure describing the arbitration process. *A Commercial Arbitration Guide For Business People*. While it may well be difficult for a lawyer to effectively summarize all to the potential differences, it is quite possible to convey objectively the basic nature of arbitration. For example, a spokesperson for the AAA recently gave the following succinct summary:

> Arbitration is hailed as a prompt and economical contractual method of resolving disputes without resort to the courts. Thus, when parties choose arbitration in preference to litigation, they must be conscious of the trade-offs found in arbitration but not found in litigation, such as (1) the privacy of the process, (2) the parties' selection of their own decision maker, (3) the absence of a jury trial, (4) the absence of a judicial appeal on the law since arbitrators are not bound by principles of substantive law absent a contractual or statutory provision to the contrary, (5) the absence of broad discovery, (6) the relaxed application of the rules of evidence,(7) the payment of arbitration administration costs by the parties themselves instead of by taxpayers and (8) the absence of a written opinion with the award unless otherwise required [Page, *Waiver of Right to Explanations*, N.Y.L.J. April, 26, 1990].[11]

The majority relies principally on DR 5-104(A) of the Code and on Rule 1.8(a), but they were intended (in our view) to address transactions between a lawyer and client other than the agreement that creates the lawyer-client relationship upon which the application of those provisions is premised.

Consent-to-jurisdiction provisions are found in a variety of commercial contracts and are ordinarily enforceable unless shown to be unreasonable upon the facts and circumstances of the particular case. A provision that would presumptively be enforceable except in extreme circumstances ought not to be unethical just because the parties are lawyer and client.

Finally, the majority concludes that the provision for a cost of collection charge of 15% is subject to DR 2-106(A), prohibiting a lawyer from collecting a "clearly excessive fee." That provision is aimed at the fee charged by a lawyer for legal services rendered to a client; it does not address the attorney's cost of collecting a debt owed by the client. Such cost-of-collection provisions are common as to other parties, and are generally enforceable unless resulting in a disproportionate award, in which case the arbitrator, like a court, can limit the award to a reasonable fee. *E.g., Central Fidelity Bank v. McLellan*, 563 A.2d 358 (D.C. Ct. App. 1989) (agreed 25% fee for collection may be awarded if reasonable); *F.W. Bolgiano & Co. v. Brown*, 333 A.2d 674, 675 (D.C. Ct. App. 1975); (court should not impose 10% maximum on fee award in collection case). It is not self-evident that a charge of 15% of the balance owing will likely be unrelated to actual costs or will otherwise likely be excessive.[12]

Inquiry No. 88-4-10
Adopted May 15, 1990

Opinion No. 212

Representation By Law Firm Adverse To Former Client In A Substantially Related Matter After Lawyers Who Represented Former Client Have Left The Law Firm

• A law firm may undertake representation adverse to a former client in a matter substantially related to the matter for the former client, provided that (i) all firm lawyers who represented the former client in the first matter have left the firm, and (ii) no lawyer remaining in the firm has, or has access to, confidences or secrets of the former client that are material to the related matter for the second client. New District of Columbia Rule 1.10(c) would compel a contrary result on and after its effective date of January 1, 1991. However, on the facts presented, and assuming the representation would otherwise continue after January 1, 1991, new Rule 1.10(c) should not be applied in this case to require the law firm to resign as counsel for the second client; the representation approved herein may continue after January 1, 1991.

Applicable Code Provisions

• **DR 4-101** (Preservation of Confidences and Secrets of a Client)

• **DR 5-105** (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer

Applicable Rules Provision[1]

• **Rule 1.10(c)** (Imputed Disqualification)

Inquiry

The inquirer is a law firm ("the Law Firm"). Beginning in late 1983 and continuing through November 1987 the Law Firm represented a client ("First Client") in connection with First Client's negotiation of a billion dollar construction contract with the United States Government for a large military facility in a foreign country.

First Client as the overall construction manager-engineer is in substance the general contractor for the project. The project is ongoing and is not expected to be completed until sometime in the mid-1990's.

In March 1987, one of the two partners of the Law Firm who had been principally involved in the representation of First Client resigned from the Law Firm and joined another law firm ("Second Law Firm"). The other partner remaining in the Law Firm who had been involved in

[10] *E.g., Carter v. Cathedral Ave. Coop, Inc.*, 566 A.2d 716 (D.C. App. 1989).

[11] The majority asserts that the arbitrators must be paid, but in AAA arbitration the arbitrators normally work without a fee.

[12] For example, with a debt of $10,000 a 15% charge would be $1,500, or 15 hours at $100/hour, which scarcely seems excessive.

[1] Rules of Professional Conduct and Related Comments (effective January 1, 1991), promulgated by Order of the District of Columbia Court of appeals dated March 1, 1990.

the representation of First Client continued to handle all matters for First Client, with the occasional help of other partners and associates. The Law Firm's representation of First Client included several matters in addition to and unrelated to the military construction project.

In October 1987, as the Law Firm was nearing the end of the lengthy contract negotiation process and related matters on behalf of First Client with the U.S. Government, a long-time client of the Law Firm ("Second Client") became a major subcontractor on the project, and asked the Law Firm to represent it vis-a-vis the project generally. At that time there were no disputes or anticipated disputes between First Client (the general contractor) and Second Client (the subcontractor).

In October 1987 the Law Firm obtained written consent of First Client to its representation of a Second Client, the consent containing this condition:

> "However, in the event of a dispute or conflict of any interest between [Second Client] and [First Client]...we would expect [the Law Firm] to remove itself from any contact or distribution of any information to any of the parties."

The Law Firm then undertook the representation of Second Client in connection with the project. The representation of Second Client was undertaken by lawyers in the Law Firm other than the lawyers who had been involved in the representation of First Client. A month later (in November 1987), apparently by coincidence, the other partner of the Law Firm who had been in charge of all matters for First Client resigned from the Law Firm and joined the same Second Law Firm that the first departing partner had joined eight months earlier. That second departing partner took all files of First Client with him to Second Law Firm.

Thus, in early November 1987, the Law Firm completely ceased to represent First Client, which thereupon and thereafter was represented by Second Law Firm on all continuing aspects of the construction project, including recurring disputes between First Client and the U.S. Government, and recurring disputes between First Client and various subcontractors.

In late 1988 disputes began to occur between First Client represented by Second Law Firm, and Second Client relating to the construction project. The Law Firm represented Second Client in connection with those disputes.

As the disputes between First Client and Second Client became more numerous and more serious, First Client in late 1989 asserted that the Law Firm must withdraw as counsel for Second Client on all disputes between First Client and Second client.

The Law Firm in its inquiry represents that, when the partner who was in charge of First Client's matters left the Law Firm in November 1987 and took all of First Client's files with him, as of that time and at all relevant times thereafter,

(a) nobody remaining at the Law Firm had any "confidences" or "secrets" of First Client within the meaning of DR 4-104(A),

(b) nobody remaining at the Law Firm had any "information [pertaining to First Client] protected by Rule 1.6" within the meaning of Rule 1.10(c), and

(c) there were no files or other records of First Client remaining within the premises of the Law Firm containing any information described in the preceding clauses (a) and (b), material to the Law Firm's ongoing representation of Second Client's contractual disputes with First Client.

Discussion

It is clear that the lawyer-client relationship between the Law Firm and Second Client that is being challenged by First Client will continue well beyond January 1, 1991 in the ordinary course of events. Therefore, among other things, this inquiry presents a novel issue as to the applicability of Rule 1.10(c) to this case when that Rule becomes effective in the District of Columbia on January 1, 1991.

In responding to this inquiry we turn first to the "current" law; we then analyze the "new" law, namely, rule 1.10(c). Before considering "the law," it is necessary to announced a caveat, and to discuss the issue presented by First Client's conditional consent (referred to above) to the Law Firm's representation of Second Client.

First, the caveat: the Law Firm's representation that it has no relevant confidences or secrets of First Client appears to be consistent with the facts available to the Committee. We therefore assume the accuracy of that representation, and it is a fundamental premise in responding to this inquiry. It is not the function of this Committee to make its own determination on such fact-intensive issues.[2]

Second, it is the Committee's view that *as a matter of legal ethics* the conditions imposed on the Law Firm by First Client in October 1987 when it consented to the Law Firm's representation of Second Client are no longer binding on the Law Firm. The reason is that those conditions were based on the assumption by all concerned that somebody at the Law Firm would continue to be in possession of, or have access to, relevant confidences or secrets of First Client, and the Law Firm's acceptance of those conditions was based on that assumption. Because that assumption is no longer correct, in our opinion those conditions no longer raise ethical concerns. Therefore, and from the viewpoint strictly of legal ethics, this inquiry is analyzed without further reference to First Client's conditional consent to the Law Firm's representation of Second Client[3]. We now turn to the applicable law.

Current Law

The Committee concludes that the Law Firm's representation of Second Client is materially adverse to First Client, and that the matter on which the Law Firm is representing Second Client is substantially related to the matter on which the Law Firm previously represented First Client. *See, e.g.*, Comment [2] under new District of Columbia Rule 1.9, which makes it clear that the sub-

[2] It appears from the material submitted to the committee by the Law Firm and First Client that the only matter relating to this construction project that any current partner or employee of the Law Firm was involved in prior to the transfer by First Client of its business and its fields to Second Law Firm in November 1987 was this: in late 1985 and early 1986, an associate (who is now a partner) of the Law firm logged eight hours of time researching the quesiton of what remedies might be available to first Client if the U.S. Government purported to terminate the then-existing letter argreement with First Client. The Law Firm has advised the Committee that the person involved has no present recollection of that research (which he turned over to one of the partners who left the Law Firm in 1987), and that in any event he did not obtain in connection with that research any "confidences" or "secrets" of First Client material to the later contractual disputes between first Client and Second Client.

[3] The Committee expresses no opinion on the question whether, as a matter of contract law, or on some other basis, First Client may enforce the October 1987 conditions against the Law Firm.

stantial relationship criterion is to be analyzed by reference to existing federal case law. An illustrative case is *United States Football League v. National Football League*, 605 F. Supp. 1448 (S.D.N.Y. 1985).

In this case, however, the combination of adverse representation and a substantial relationship is not the end of the analysis. There are no District of Columbia cases or opinions of this Committee precisely on point, but a consensus has emerged in the Code of Professional Responsibility states generally that, under DR 4-101 and DR 5-105, the Law Firm's representation of Second Client in these circumstances is permissible, because nobody at the Law Firm has, or has access to, relevant confidences or secrets of First Client. Since 1983, that principle has been codified in what is now ABA Model Rule 1.10(b):

> "(b)When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> "(1)the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
>
> "(2)any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter."[4]

Thus, "current" law, as evidenced by and codified in ABA Model Rule 1.10(b), predicates disqualification on (i) a substantial relationship *and* (ii) possession of relevant confidences or secrets of the former client. In this case, predicate (ii) is absent, so the Law Firm's representation of Second Client is proper under current law.

New Law

District of Columbia Rule 1.10(c), the counterpart of ABA Model Rule 1.10(b), would disqualify the Law Firm (effective January 1, 1991) because the D.C. Rule is drafted in the disjunctive: it predicates disqualification on (i) a substantial relationship *or* (ii) possession of relevant confidences or secrets of the former client:

> "(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer during the association unless:
>
> "(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client during such former association; or
>
> "(2) any lawyer remaining in the firm has information protected by Rule 1.6 that is material to the matter."

The District of Columbia deviation from ABA Model Rule 1.10(b), resulting in the more restrictive District of Columbia Rule 1.10(c) quoted above, is both explicit and deliberate. The original version of the District of Columbia rules was drafted by the District of Columbia Bar Model Rules of Professional Conduct Committee (commonly referred to as the "Jordan Committee" after the name of its Chair, Robert E. Jordan, III, Esquire). The Jordan Committee in its September 1985 Report to the District of Columbia Bar Board of Governors proposed the deviation from the ABA version. The Jordan Committee's proposal was adopted by the Bar Board of Governors in its November 19, 1986 Petition to the District of Columbia Court of Appeals, and by the Court of Appeals in its September 1, 1988 Proposed Rules, and in its March 1, 1990 Order promulgating the new Rules.

The Jordan Committee, acknowledging that the question was a close one, explained its stricter version of Rule 1.10(c) as follows:

> "The ABA [Rule 1.10(b)] would disqualify the firm only if the matter were the same matter or substantially related to a matter in which the departing lawyer represented the client while with the firm *and* a lawyer still with the firm possessed client confidences or secrets material to the matter. [Emphasis in original.] The Committee thought it wrong that adverse representation should be allowed, in any kind of matter, where client confidences or secrets material to the matter remain in the firm. It therefore proposes changing the ABA's 'and' to 'or' in paragraph (c). It is a closer question whether the possession by a remaining lawyer of confidences or secrets should not be the sole test for firm disqualification. The committee believed, however, that it is appropriate to provide for disqualification in the same or related matter to avoid the unseemly spectacle of all the lawyers responsible for a particular piece of litigation leaving a firm and the firm turning up the next day as counsel for the opposing party. Apart from the general unseemliness of such a situation, the firm might well have in its files, or in the knowledge paralegals or other nonlegal personnel, significant confidences or secrets of the former client. **Rather than requiring an inquiry into the knowledge of confidences or secrets, paragraph (c) simply forbids representation by the former firm in such circumstances.**" [Bold type in original.]

Consistent with the foregoing, the official Comment under District of Columbia Rule 1.10 contains the following explanation of Rule 1.10(c):

> "[17] Conversely, when a lawyer terminates as association with a firm, paragraph (c) provides that the old firm may not thereafter represent clients whose interests are materially adverse to those of the formerly associated lawyer's client in respect to a matter which is the same or substantially related to a matter with respect to which the formerly associated lawyer represented the client during the former association. For example, if a lawyer who represented a client in a litigation while with Firm A departs the firm, taking to the lawyer's new firm the litigation, Firm A may not, despite the departure of the lawyer, who takes the matter and the client to the new firm, undertake a representation adverse to the former client in that same litigation."

The Jordan Committee, the Board of Governors, and the Court all were concerned about what the Jordan Committee described as the "unseemly spectacle" (not present in this case) of a law firm switching sides in a pending case immediately following the departure from the firm of all of the lawyers who had previously been involved on the other side of that case. In addition, the Jordan Committee expressed its concern about a key issue identified above: the difficulty of determining as a matter of fact exactly what information the lawyers remaining in a firm have in their heads or in their files following the departure of a lawyer or group of lawyers who had represented a former client.

The "effective date" or "retroactivity" issue presented by this inquiry appears to have been anticipated at least to some extent by the Court of Appeals in its March 1, 1990 Order, which contains the following paragraph:

[4] This ABA Model Rule was lettered 1.10(c) when it was originally promulgated in 1983; it was relettered 1.10(b) without substantive change as part of the ABA's February 1989 revisions of the Model Rules.

"FURTHER ORDERED, that with respect to conduct occurring before January 1, 1991, the provisions of the Code of Professional Responsibility in effect on the date of the conduct in question are the governing rules of decision for this court, the Board on Professional Responsibility, its hearing committees, and the Bar Counsel."

The foregoing effective date provision appears to us to encourage restraint in applying new Rule 1.10(c) in the circumstances presented by this inquiry. We therefore conclude that in this case the Law Firm's representation of Second Client should be permitted to continue on and after January 1, 1991.

The issue presented by this inquiry may not be unique, and it is therefore appropriate to provide clarity and guidance for others similarly situated. We observe that our conclusion could have been, but is not, based on the fact that the representation at issue here commenced prior to March 1, 1990, the date of the Court of Appeals' final Order promulgating the new Rules. It is self-evident that, because of the Court's well-publicized January 1, 1991 effective date, many members of the Bar (including many of the most conscientious and best-informed members) will not read and analyze the new Rules until toward the end of the year. The Court in its Preface to the new Rules explicitly acknowledged that the new Rules are "complex and comprehensive," and urged Bar members to attend "educational workshops" to be sponsored by the Bar "[o]ver the course of the next year." Those workshops, which are now being planned, will not commence until October of this year and are not expected to be completed until mid-November at the earliest.

It is therefore unrealistic and unreasonable to assume that members of the Bar have actual knowledge or to charge them with constructive knowledge of the content of the new Rules as of March 1, 1990 or as of any other date prior to January 1, 1991. Accordingly, we hold that, if a lawyer-client relationship formed prior to January 1, 1991 was proper when commenced and continued to be proper under ethics principles applicable prior to January 1, 1991, the new Rules of Professional Conduct should not be applied on and after January 1, 1991 to require the abrupt termination of any such previously proper relationship.

Inquiry No. 89-12-43
Approved: May 15, 1990

Opinion No. 213

Defense Counsel's Obligation to Inform Court of Adverse Evidence

Applicable Code Provisions

- **DR 4-101(B)(1)** (Nondisclosure of confidence or secret)
- **DR 7-102(A)(4)** (Knowing use of false evidence)
- **DR 7-102(A)(5)** (Knowing false statement of fact)
- **DR 7-102(B)(2)** (Revealing fraud upon tribunal by non-client)

Applicable Rules Provisions

- **Rule 1.6** (Confidentiality of Information)
- **Rule 3.3** (Candor Toward The Tribunal)

Inquiry

This inquiry arises out of a post-trial ineffective assistance of counsel proceeding in the Superior Court. The inquirer argued in that proceeding that his predecessor's representation of a criminal defendant was ineffective because predecessor counsel failed to secure enforceable process upon a witness ("Witness B") whose testimony allegedly would have exculpated the defendant. Predecessor counsel had located another witness ("Witness A") who advised him that she had heard Witness B confess to the crime in question. Predecessor counsel spoke to Witness B, who promised to be present for trial. Witness B was mailed a subpoena. However, it is not clear whether Witness B was properly served with the subpoena, and he did not appear for trial.

In supporting the ineffective assistance of counsel petition, the inquirer submitted an affidavit from Witness A that recounted the inculpatory statement Witness B allegedly made in her presence.[1] The petition argued, inter alia, that the failure to secure enforceable service of a subpoena upon Witness B was prejudicial to the client and rendered predecessor counsel's assistance ineffective.

Some months after the court took the matter under advisement, the inquirer located Witness B, who denied making any statements of any kind to Witness A. The inquirer asks whether he has an ethical obligation to inform the court that Witness B denies making the inculpatory statement.

Discussion

Consideration of this inquiry must start with DR 4-101, "Preservation of confidences and secrets of a client." The information that the inquirer learned from his interview of Witness B -- that Witness B denies making inculpatory statements to Witness A -- comes within the definition of a "secret." DR 4-101(A) (a secret is information, other than confidence, that is "gained in the professional relationship...the disclosure of which...would be likely to be detrimental to the client."[2] Thus, unless the disclosure of the secret is "permitted under DR 4-101(C)," the inquirer may not reveal the information he learned from Witness B. DR 4-101(B)(1).

The only provision of DR 4-101(C) that would appear relevant to this inquiry is subparagraph (2), which allows disclosure of confidences and secrets "when permitted under Disciplinary Rules or required by law or court order." Under this standard, the Committee concludes that the inquirer may not reveal his client's secret.[3]

1. DR 7-102(A)(4) (Knowing use of false evidence).

It is true that the inquirer now possesses information that conflicts with the sworn statement of Witness A, a statement that the inquirer has presented to the court. However, inquirer states that he submitted Witness A's statement to the court before he located and interviewed Witness B. Thus, on the facts

[1] Although Witness A testified at the criminal trial, the inquirer advises that testimony regarding Witness B's statement was not elicited, because Witness A had not been "asked the proper questions." The Committee offers no opinion regarding this assertion.

[2] *See also* Comment 6 to Rule 1.6 of the D.C. Rules of Professional Conduct, which provides that the prohibition against disclosure of secrets "exists without regard to the nature or source of the information or the fact that others share the knowledge."

[3] This opinion is limited to consideration of disclosures "permitted under Disciplinary Rules." The inquiry makes no reference to a court order mandating disclosure of the secret, so the Committee presumes no such order exists. *See* Opinion 180. Whether the inquirer was or is "required by law" to disclose the information in question is a legal issue that is beyond the authority of the Committee to decides. *Id.* at n. 1.

presented, there appears to be no violation of DR 7-102(A)(4), because the element of counsel's prior knowledge of any falsity is absent.

The simple existence of conflicting witness statements does not by itself rise to the level of "knowledge" that one such statement is false. *See Butler v. United States*, 414 A.2d 844 at 850 (D.C. App. 1979) and the cases cited therein. In any event, when the inquirer presented Witness A's affidavit to the court, he had no knowledge that Witness B would make a contrary statement. The Committee therefore cannot conclude that, in submitting Witness A's affidavit, the inquirer knowingly submitted a false statement.

2. DR 7-102(A)(5) (Knowing false statement of fact).

Similarly, under the facts presented, the inquirer did not *knowingly* make false statements of fact in his petition, to the extent that he argued that Witness B would have exculpated the defendant had the witness been required to appear at trial. DR 7-102(A)(5). The element of *knowledge* of any falsity at the time the statement may have been made to the court is lacking.[4]

3. DR 7-102(B)(2) (Revealing fraud upon a tribunal by a non-client).

Finally, there is the question whether DR 7-102(B)(2) requires counsel to reveal to the court the conflict between the statements of Witness A and Witness B, on the grounds that Witness A's statement amounts to a "fraud upon a tribunal" by a non-client. The Committee concludes that DR 7-102(B)(2) does not mandate disclosure under these facts.

The obligation to disclose non-client fraud is predicated upon a lawyer's having received "information clearly establishing" the fraud. *See In re Grievance Committee of U.S. District Court*, 847 F.2d 57, 62-63 (2d Cir. 1988) (interpreting DR 7-102(B) as requiring "actual knowledge of a fraud.") The Committee believes that, standing alone, the conflicting statements described in the inquiry do not clearly establish that Witness A's statement is false.

Conclusion

Under the facts presented, the inquirer must preserve the confidences and secrets of his client. The inquirer therefore is not ethically obligated to disclose to the Court the information he learned from his interview of Witness B. Indeed, such disclosure at present would be prohibited.[5]

However, the inquirer must exercise care in any *future* dealings with the court in this matter. Given his present knowledge that Witness B denies making inculpatory statements to Witness A, the inquirer should insure that any future representations to the court regarding what Witness B's testimony would have been do not run afoul of the inquirer's ethical obligations. *See In re Austern*, 524 A.2d 680 (D.C. App. 1987).

Inquiry No. 89-11-41
Adopted: June 19, 1990

Opinion No. 214

Disclosure to Internal Revenue Service of Name of Client Paying Fee in Cash

Applicable Code Provisions

- **DR 4-101(B), Rule 1.6(a)**(A Lawyer Shall Not Knowingly Reveal A Confidence or Secret of the Lawyer's Client Nor Use a Confidence or Secret of the Client to the Client's Disadvantage.)
- **DR 4-101(C)(3); Rule 1.6(d)**(A Lawyer May Reveal Confidences or Secrets When Permitted Under Disciplinary Rules or Required by Law or Court Order.)

This Inquiry raises an important issue concerning the confidentiality of client names requested to be disclosed under government reporting requirements.

Facts

The Inquirer, a law firm, represented a client in connection with drug related criminal charges to which the client has pleaded guilty, been sentenced and served his term of incarceration. In partial payment of the firm's outstanding bill for services, the client remitted in excess of $12,000 in cash. In accepting the cash payment, the firm explained to the client that the firm would be required to submit Form 8300, Report of Cash Payments Over $10,000 Received In a Trade or Business, to the Internal Revenue Service. At the client's insistence, the firm agreed to withhold the client's name from Form 8300. The firm advised the client, however, that the Internal Revenue Service might seek to compel disclosure of the client's name, and he agreed to accept financial responsibility for the firm's efforts in resisting disclosure. The client, however, still owes a substantial amount to the firm from its prior representation of him.

More than a year after submitting the redacted Form 8300, the firm was served with an administrative summons, directing the firm's managing partner to appear before an IRS Revenue Agent to give testimony and to produce for examination the following information relating to the Form 8300:

> The unredacted, unaltered, originals of all records related to or associated with the attached Form(s) 8300 filed by you, including but not limited to accounting records, cash receipts journals, bank records, escrow account records, payment records, contracts, which contain the following information *necessary to complete the attached Form(s) 8300:*
>
> 1. The complete name(s), address(es), business or occupation(s) and social security or taxpayer identification numbers(s) of any and all clients (whether individual(s) and/or organization(s)) for whom the transaction(s) reported were completed.
> 2. The complete name(s), address(es) and taxpayer identification number(s) of any and all individuals conducting the reported transaction(s), if different from the information in item number 1.
> 3. The passport number(s) and country(ies) of origin and/or alien registration number(s) and country(ies) of origin for all foreign individual(s) or organization(s) who conducted the transaction(s) or for whom the transaction(s) was/were completed.
> 4. Any other identifying data for the individual(s) or organization(s) who conducted the transaction(s) or for whom the transaction(s) was/were conducted.

The firm has refused to comply with the summons pending the Committee's resolution of this Inquiry, which raises three questions:

1. Whether the firm is obligated pursuant to its ethical responsibilities to withhold from the IRS the client's identity notwithstanding the pending summons from the IRS?

[4] Nonetheless, as noted below, the inquirer must take care to avoid knowlingly making false statements in the future.

[5] The Committee concludes that the result reached in this opinion would be the same under the Rules of Professional Conduct that will go into effect in the District of Columbia on January 1, 1991. *See* Rules 1.6 (Confidentiality of Information) and 3.3 (Candor toward The Tribunal).

2. If so, what is the extent of that obligation? Does it include an obligation to file an action seeking to quash the summons, to be held in contempt, or to appeal any adverse decision by an IRS administrative tribunal or by a district court?
3. In what way, if any, does the client's failure to meet his financial obligations affect the firm's obligation to litigate these issues on his behalf?

Discussion

DR 4-101(B) of the Code of Professional Responsibility provides that a lawyer shall not knowingly "reveal a confidence or secret of his client." DR 4-101(C)(2) allows disclosure of "[c]onfidences and secrets when permitted under Disciplinary Rules or required by law or court order." Similar rules apply under Rule 1.6 of the District of Columbia Rules of Professional Conduct (effective January 1, 1991).

In Opinion No. 180 (March 17, 1987), the Committee summarized its prior opinions relating to the disclosure of client information to governmental authorities, stating "[t]he consistent rule we have followed is that, in the absence of on-going criminal activity, a lawyer may not voluntarily compromise the client's position." In Opinion No. 99 (January 28, 1981), the Committee stated that where there is a "colorable basis" for asserting that statements made to an attorney are confidences or secrets protected from disclosure by DR-4-101, "the lawyer must resolve the question...in favor of preserving the confidentiality of the disclosures." *Accord*: Opinion No. 186 (October 20, 1987).

Opinion No. 124 (March 22, 1983) involved facts similar to those presented here. In the course of a routine audit of a law firm's federal tax returns, the IRS auditor was provided a record of the firm's receipts with the clients' names deleted. The auditor then requested the firm to provide the clients' names. The firm had represented members of Congress under circumstances the disclosure of which, the firm believed, could be damaging to the Members' careers. It requested guidance as to whether under these circumstances it could accede to the auditor's request.

The Committee held in Opinion No. 124 that "whenever a client requests nondisclosure of the fact of representation, or circumstances suggest that such disclosure would embarrass or detrimentally affect any client, the fact of the firm's representation of that client is a client 'confidence' or 'secret' subject to the protections accorded by the other provisions of Canon 4." The firm could not therefore voluntarily accede to the auditor's request. Furthermore, the Committee held, "...if the IRS does issue a summons, the inquirer's firm may not automatically comply with it. Rather, the firm remains under an ethical obligation to resist disclosure until either the consent of the client is obtained or the firm has exhausted available avenues of appeal with respect to the summons." Only after the firm is ordered by a court to disclose the names of its clients may it do so.

The client in this case has requested that the firm withhold his name from the Internal Revenue Service; moreover, as in Opinion No. 124, disclosure of the client's name to the Internal Revenue Service could "embarrass or detrimentally affect" the client.[1] An important difference between this case and Opinion No. 124, however, is that the name of the firm's client is not sought under the IRS' general authority to examine "relevant and material" books and records. *See*, 26 U.S.C. §7602(a)(1). Section 6050I of the Internal Revenue Code, the statutory authority for Form 8300, is narrowly and specifically drawn to require disclosure of the names and other identifying information of persons making cash payments in excess of $10,000 received in the course of a trade or business. Civil and criminal penalties are available to enforce its provisions. *See*, 26 U.S.C. §§6721, 6724(d) and 7203. Section 6050I is, therefore, a "law" which may justify disclosure of client confidences or secrets under DR 4-101(C)(2) in an appropriate case.

It does not necessarily follow that disclosure of the client's name is "required by" section 6050I in this case or other similar cases. Under the present state of the law, substantial good faith arguments exist as to whether law firms are a "trade or business" within the meaning of section 6050I[2] and whether Congress intended the statute to override traditional lawyer-client confidentiality.[3] Until these and any other questions regarding the coverage of section 6050I in a particular case are resolved definitively by the courts, our prior Opinions are clear that a firm may not ethically disclose the name of its client on Form 8300 without the client's consent.[4] Furthermore, since the IRS' administrative summons is intended to obtain the information withheld from Form 8300, the firm may not voluntarily disclose the client's name in response to the summons.

Our prior Opinions also address the firm's second question regarding the extent of the duty to resist compelled disclosure of client confidences and secrets. In Opinion No. 14 (January 26, 1976) we were asked to define the extent of an attorney's duty to protect the confidentiality of a former client's records subpoenaed by a grand jury. We stated that "it is the lawyer's ethical duty to a former client to assert on the former client's behalf every objection or claim of privilege available to him when to do so might be prejudicial to the client." In Opinion No. 124, involving IRS, we stated that "the attorney must assert in the pending proceeding the client's interests in nondisclosure." *See also*, Opinion No. 99 (January 28, 1981) ("inquirer's obligation is to assert before the grand jury the confidentiality of those statements"); Opinion No. 180 (absent the client's consent to disclosure, the attorney "must as-

[1] The government, for example, may prosecute a taxpayer for failing to report income by demonstrating that the defendant's net worth is so substantial that it may be inferred that he or she received income that was not reported to the IRS. *E.g.*, *Holland v. U.S.*, 348 U.S. 121 (1954); *United States v. Citron*, 783 F.2d 307 (2d Cir. 1986).

[2] The American Bar Association and other lawyers' organizations urged the IRS to include an exception for attorney's fees in the regulations issued under Section 6050I. The IRS refused. *See*, 51 F.R. 31610 (September 4, 1986).

[3] The identity of an attorney's client and information regarding the payment of attorneys' fees generally are not protected from forced disclosure by the attorney-client privilege. *See, e.g.*, *In re Semel*, 411 F. 2d 195 (3rd Cir. 1969); U.S. v. Fenlag, 434 f. 2d 596 (6th Cir. 1970); *In re Grand Jury Proceedings*, (*Rabin v. U.S.*), 896 F.2d 1297 (11th Cir. 1990). Exceptions to this rule have been recognized, however, hwere the values promoted by the privilege outweigh the need for disclosrue of the client's identity. *See, e.g.*, *Baird v. Koepher*, 279 F.2d 623 (9th Cir. 1960); *Tillotson v. Boughner*, 350 F.2d 663 7th Cir. 1965); *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965); *In re Gand Jury Proceedings* (*U.S. v. Jones*), 517 F.2d 666 (5th Cir. 1975); *In re grand Jury Investigation No. 83-2-35*, 723 F.2d. 447 (6th Cir. 1983).

[4] The Professional Responsibility Committee of the Chicago Bar Association has similarly concluded that an attorney should not reveal the name of a client to the IRS in Form 8300 because the application of the statute to attorneys is unclear. Docket No. 86-2 (5-11-88).

sert the confidentiality of the documents and information....") Thus, if the IRS files an action to enforce its summons, the firm must assert the client's objections to disclosure.[5]

Our prior Opinions are not entirely clear as to whether a lawyer who is ordered by a court to disclose client confidences or secrets may comply immediately with this order or must seek review of a higher court. In Opinion No. 124, we said with respect to an IRS subpoena that the firm could not comply until it had obtained its clients' consent or "exhausted available avenues of appeal with respect to the summons." It is not clear, however, whether the Committee intended the word "appeal" to mean a court's initial review of the agency's decision or a higher court's review of an initial judicial order. Our other opinions in this area suggest that the lawyer need not appeal an initial judicial order to a higher court, although he or she must allow the client an opportunity to do so. In Opinion No. 14, for example, we stated that "the attorney is...free to comply with whatever directive the *trial court* gives." (Emphasis added.) In Opinion No. 83 we stated that an attorney "is not obliged to run the risk of being held in contempt of court because of the client's desire that confidences and secrets not be disclosed." And, in Opinion No. 180 we stated that "if attorney is ordered by a court to disclose the client information, he must not make disclosure until he has given *the client* an opportunity to appeal the order to a higher tribunal." (Emphasis added.)

The trend of our prior decisions is supported by the new Rules of Professional Conduct. Comment 26 to Rule 1.6 states:

> If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (d)(2) requires the lawyer to invoke the privilege when it is applicable. The lawyer may comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. But a lawyer ordered by a court to disclose client confidences or secrets should not comply with the order until the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it.

In light of our prior decisions and Comment 26, we conclude that the law firm here may comply with a final judicial order enforcing an IRS summons without seeking appellate review of that order, but only after giving its client notice of the court's order and a reasonable opportunity to seek review independently of the firm.[6]

Finally, in response to the firm's third question, the fact that the client is in arrears in his payments to the firm does not relieve the firm of its basic ethical obligation to resist disclosure in response to the IRS summons. The Committee has consistently held that DR 4-101(c) prohibits disclosure of confidences and secrets of a former client. *See*, e.g., Opinion Nos. 14, 58, 96, 99, 124, 175, 180, 186. In none of these opinions was there any suggestion that the Committee envisioned that the lawyer would be compensated by the former client for his or her efforts in protecting against disclosure. Indeed, in two of our previous decisions, the client was currently represented by other counsel at the time that the information was demanded and we nevertheless found an obligation on the part of the former attorney to resist disclosure. *See*, Opinion Nos. 14, 83. The ethical obligation of lawyers to protect the confidences and secrets of their clients is not a matter of contract between the lawyer and client; the obligation arises because "confidentiality is essential to the role of the lawyer in the administration of justice," Opinion No. 180, and because, under Canon 1, every lawyer has a duty "to assist in maintaining the integrity and competence of the legal profession."[7]

[5] In appearing and asserting the client's objections to disclosure, the firm is serving, in effect, as a witness in the proceeding. Whether the firm must go further and act as an advocate for the client's position will depend upon a number of circumstances including whether the client or former client has been notified of the proceeding and whether the client or former client has been able to retain separate counsel to advocate his or her interests in teh proceeding. Where the client or former client is unable to participate because he or she is incarcerated, incapacitated or unable to afford separate counsel, the firm may have an obligation to act as an advocate for the clients or former client.

[6] A duty to appeal the order may exist, however, where the client is unable to act. *See, supra* note 5.

[7] It is possible that a lawyer may have an action against a current or former client who refuses to pay for such services although having the means to do so, especially where, as here, the representation with respect to disclosure has previously been agreed to by the client. This is a question of law which is beyond the jurisdication of this Committee.

Inquiry 90-4-18
Adopted September 18, 1990

Opinion No. 215

Communication with Potential Client Currently Represented by Other Counsel

• A lawyer is not prohibited by the Code of Professional Responsibility or the Rules of Professional Conduct from communicating with a person who is currently represented by counsel for the purpose of determining whether such person may wish to retain the lawyer and discharge the current lawyer.

Applicable Code Provisions

• **DR 7-104(A)(1)** (Communicating with One of Adverse Interest)
• **DR 2-104** (Suggestion of Need of Legal Services)

Applicable Rules Provision[1]

• **Rule 4.2(a)** (Communication Between Lawyer and Opposing Parties)

The Inquiry

The inquirer is an attorney who was retained to represent a client in a matter on which the client was then being represented by other counsel. The client was apparently dissatisfied with the first attorney's representation. The inquirer wrote the first attorney advising him that the inquirer had been retained and asking that he turn over the client's file. The client had met all her financial obligations to the former attorney. The former attorney wrote the inquirer accusing her of unethical conduct, apparently on the theory that the inquirer spoke with the client on the subject of the representation before the client had discharged the former attorney. The former attorney also demanded payment of $13.75 to cover photocopying the client's file and postage to mail it to the new attorney.

The inquirer asks for the Committee's views on whether it is unethical for an attorney to offer advice and legal services to a person who is already represented by

[1] The Rules of Professional Conduct are effective on January 1, 1991. They are cited as Rule_____. The Code of Professional Responsibility is cited as DR_____.

counsel and who expresses dissatisfaction with his or her current attorney.

Discussion

There is no provision of the Code of Professional Responsibility or the Rules of Professional Conduct which prohibits an attorney from conferring with a potential client who is already represented by counsel on the matter. Nevertheless the Committee believes there is a common misconception among some members of the bar that such contact is prohibited until after the client has first discharged the prior lawyer.

DR 7-104 (Communicating With One of Adverse Interest) provides:

> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Does DR 7-104(A)(1) prohibit a lawyer from communicating with a person who is already represented by counsel for the purpose of having that person possibly retain the lawyer and discharge the prior lawyer? In our opinion DR 7-104 does not prohibit such communication. Neither the text of the rule itself nor the purpose underlying the rule admits of such an interpretation.

The title of the rule, Communication With One of Adverse Interest, indicates that the represented person with whom the lawyer may not communicate without permission is a party adverse to that lawyer's client, not a person who has sought the lawyer's advice and representation to replace an attorney previously retained for the matter.[2] The rule refers to communication "during the course of [the lawyer's] representation of a client"--a lawyer consulting with a potential client is not engaging in a communication during the course of representation, since at this point the lawyer does not yet have a client. The communication which is prohibited is with "a party [the lawyer] knows to be represented" without consent of "such *other* party['s]" lawyer--the reference to *other* party can only mean a party other than the party being represented by the lawyer seeking the communication. Rule of Professional Conduct 4.2(a)(Communication Between Lawyer and Opposing Parties) is virtually identical to DR 7-104(A)(1). Therefore, the result would be the same under the new rules.

DR 2-104 prohibits a lawyer who has given **unsolicited** advice to a layperson from accepting employment resulting from the advice under two circumstances, where the advice includes a statement that is false, fraudulent, misleading or deception, and where the advice involves coercion or other overreaching. There is nothing in DR 2-104 which prohibits a lawyer from giving advice to a person already represented by counsel when the client has sought the lawyer's advice. The analogous provision in the Rules of Professional Conduct, Rule 7.1(b) prohibits solicitation of employment by any of several inappropriate means, including false statements and undue influence.

Finally, although we were not asked to comment on the former lawyer's demand for payment to photocopy and mail the file, we note that we have previously addressed a client's right to have a former lawyer provide file materials to the current lawyer in Legal Ethics Committee Opinion 168.

Inquiry No. 90-5-22
Adopted October 16, 1990

[2] Of course, the lawyer may not represent the client in any event if the lawyer has a conflict of interest. DR 5-101. Our opinion presupposes that there is no other such conflict that would prevent the lawyer from taking on this particular client.